87-216

No. _____

Supreme Court, U
FILED
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JOSEPH F. SPANIO
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE CITY OF FONTANA, a Municipal Corporation; ROBERT MEJIA, LARRY SMITH, NATHAN A. SIMON, CHARLES A. KOEHLER, BEN ABERNATHY, BILL FREEMAN, DONALD F. DAY, WILLIAM KRAGNESS, JACK RATELLE, JOHN M. RAGER, and KATHY WILSON,

Petitioners,

vs.

SONJA RENEE SMITH, as Administratrix of the Estate of RUFUS A. SMITH, SR., Deceased, as Guardian Ad Litem for the Minor Children of the Deceased, and Individually; RUFUS ANTHONY SMITH, JR., Individually; and MARCUS SMITH, a Minor; NETRA SMITH, a Minor; ANTHONY SMITH, a Minor; JARREN SMITH, a Minor; SHERRI SMITH, a Minor; ARKILLIUS SMITH, a Minor; and TASHIEKA SMITH, a Minor,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

COTKIN, COLLINS & FRANSCELL
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QUESTIONS PRESENTED

1. Whether family members, other than the parents, of a decedent who died as a result of governmental action are deprived of a cognizable Constitutional interest thereby.

2. What is the nature of the Constitutional deprivation suffered by a family member of a decedent who died as a result of governmental action.

LIST OF PARTIES AND RULE 28.1 INFORMATION

The parties to the California proceedings below were:

Petitioners, CITY OF FONTANA, a municipal corporation; ROBERT MEJIA and LARRY SMITH, police officers of the City of Fontana; NATHAN A. SIMON, Mayor of the City of Fontana; CHARLES A. KOEHLER, Mayor Pro Tem of the City of Fontana; BEN ABERNATHY, Chief of Police of the City of Fontana; BILL FREEMAN, DONALD F. DAY, and WILLIAM KRAGNESS, Councilmembers of the City of Fontana; JACK RATELLE, City Manager of the City of Fontana; JOHN M. RAGER, City Attorney of the City of Fontana; and KATHY WILSON, Personnel Director of the City of Fontana; and

Respondents, Sonja Renee Smith, an adult child of the decedent, individually; as Administratrix of the Estate of Rufus A. Smith, Sr.; and as Guardian Ad Litem for Marcus Smith, Arkillius Smith, Netra Smith, Anthony Smith, Jarren Smith, Sherri Smith, and Tashieka Smith, the minor children of the decedent; and Rufus A. Smith, Jr., an adult child of the decedent, individually.

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No._____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE CITY OF FONTANA, a Municipal Corporation; ROBERT MEJIA, LARRY SMITH, NATHAN A. SIMON, CHARLES A. KOEHLER, BEN ABERNATHY, BILL FREEMAN, DONALD F. DAY, WILLIAM KRAGNESS, JACK RATELLE, JOHN M. RAGER, and KATHY WILSON,

Petitioners,

vs.

SONJA RENEE SMITH, as Administratrix of the Estate of RUFUS A. SMITH, SR., Deceased, as Guardian Ad Litem for the minor children of the Deceased, and individually; RUFUS ANTHONY SMITH, JR., individually; and MARCUS SMITH, a minor; NETRA SMITH a minor; ANTHONY SMITH, a minor; JARREN SMITH, a minor; SHERRI SMITH, a minor; ARKILLIUS SMITH, a minor; and TASHIEKA SMITH, a minor,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioners, THE CITY OF FONTANA, a municipal corporation, ROBERT MEJIA, LARRY SMITH, NATHAN A. SIMON, CHARLES A. KOEHLER, BEN ABERNATHY, BILL FREEMAN, DONALD F. DAY, WILLIAM KRAGNESS, JACK RATELLE, JOHN M. RAGER, and KATHY WILSON, pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeal for the Ninth Circuit, granting, in part, Respondents' Appeal. Respondents were seeking reversal of an order of dismissal of the United States District Court for the Central District of California, entered against them on August 23, 1982, dismissing the Complaint in its entirety.

JURISDICTION

Respondents timely filed a Notice of Appeal from the Order of Dismissal of the District Court. The Court of Appeal filed its Opinion on January 6, 1987. Petitioners' Petition for Rehearing En Banc was filed January 20, 1987. The Court of Appeal amended its Opinion on May 5, 1987 and July 7, 1987.

The jurisdiction of this Court is invoked under:

(a) Article 3, Section 2, Clause 2, United States Constitution; and

(b) 28 United States Code, Section 1254(1).

The Opinion and Amended Opinions of the Court of Appeal and the Order of

Dismissal of the District Court are filed under separate cover concurrently with this Petition as Appendices "A", "B", "D" and "I".

STATUTES INVOLVED

Amendment IV of the United States Constitution:

> "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ."
>
> (As Applied to the States)

Article XIV, Section 1, of the United States Constitution:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law . . . ."

42 United States Code, Section 1981:

> "All persons within the jurisdiction of the United

States shall have the same right in every State . . . to the full and equal benefit of all laws and proceedings for the security of persons . . . as is enjoyed by white citizens . . . ."

42 United States Code, Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 United States Code, Section 1988:

"The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in

> conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . . , the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . ."

STATEMENT OF THE CASE

This is a petition seeking to delimit the extension of vicarious Constitutional protection provided to family members, other than parents, of a family member who died as a result of governmental action.

Rufus A. Smith, Sr., died as a result of gunshot wounds inflicted by Fontana police officers. Respondents, the minor and adult children of the decedent, filed suit in the United States District Court for the Central District of California pursuant to the Civil Rights Act. The District Court dismissed the complaint in its entirety on Petitioners' motion, on the basis that state tort law provided an adequate post-deprivation remedy.

The Ninth Circuit Court of Appeal, relying on this Court's decision in Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), held that

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), applies only to violations of procedural, and not substantive, due process.

The Court of Appeal further held that the children could assert violations of their personal substantive due process rights as a result of the death of their father. In doing so, the Court extended the relief provided to parents of children whose Constitutional rights are vicariously violated as a result of governmental action taken against the child, to children of a parent who suffered a constitutional deprivation as a result of

governmental action. The Court of Appeal thus extended the Constitutional protection afforded by this Court to parents of minor children to protect the parents' interest in the custody and upbringing of their children, to protect the interests of both minor and adult children in the "companionship and support" of a parent.

The Court of Appeal's decision below represents an unwarranted extension of the holding in Daniels v. Williams, supra, and exposes the federal courts to a potential flood of spurious "coattail" litigation brought by family members vicariously asserting a violation

of their constitutional rights as a result of governmental action taken against another family member.

HOW THE FEDERAL QUESTION WAS PRESENTED

Petitioners argued before the Ninth Circuit Court of Appeal that California post-deprivation tort remedies were sufficient to provide relief to Respondents, and therefore, based on Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) and Rutledge v. Arizona Board of Regents, 660 F.2d 1345 (9th Cir. 1981) Respondents could not state a claim for relief under the Civil Rights Act.

REASONS TO GRANT THE WRIT

This Court has yet to address the question of whether the death of one family member as a result of governmental action deprives another family member of a cognizable Constitutional interest.

This Court has extended Constitutional protection to parents of children to vindicate the parents' Constitutional deprivations occurring as the result of governmental action taken against the children. The Courts of Appeal have broadened that protection to include Constitutional deprivations suffered by other family members, based on a number of different

rationales, to protect a variety of substantive interests.

That broadened protection has been inconsistently extended among the Circuits with respect to the identity of those additional family members whose Constitutional interests are protected, and the nature of the Constitutional deprivations suffered by them.

The Ninth Circuit, in the action below, has extended Constitutional protection by virtue of 42 U.S.C. Section 1983 to both the minor and adult children of a parent who died as a result of governmental action, based on a deprivation of the childrens'

liberty interest in the companionship and support of their parents.

This trend of providing vicarious Constitutional protection to family members based on governmental action taken against another family member has the effect of opening the floodgates to a deluge of spurious "coattail" litigation in the federal courts.

Thus, whether protection should further be extended to other family members for Constitutional deprivations resulting from the death of another family member as a result of governmental action, and the nature of the Constitutional

deprivations suffered thereby, is a substantial and important question meriting review and resolution by this Court.

CONCLUSION

For the foregoing succinct reasons, this Petition for Certiorari should be granted.

Dated: August 3, 1987

Respectfully submitted,

BRADLEY C. WITHERS
PAUL N. PAQUETTE

Attorneys for
Petitioners

Supreme Court, U.S.
FILED
AUG 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-216

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE CITY OF FONTANA, a Municipal Corporation; ROBERT MEJIA, LARRY SMITH, NATHAN A. SIMON, CHARLES A. KOEHLER, BEN ABERNATHY, BILL FREEMAN, DONALD F. DAY, WILLIAM KRAGNESS, JACK RATELLE, JOHN M. RAGER, and KATHY WILSON,

Petitioners,

vs.

SONJA RENEE SMITH, as Administratrix of the Estate of RUFUS A. SMITH, SR., Deceased, as Guardian Ad Litem for the Minor Children of the Deceased, and Individually; RUFUS ANTHONY SMITH, JR., Individually; and MARCUS SMITH, a Minor; NETRA SMITH, a Minor; ANTHONY SMITH, a Minor; JARREN SMITH, a Minor; SHERRI SMITH, a Minor; ARKILLIUS SMITH, a Minor; and TASHIEKA SMITH, a Minor,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
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APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SONJA RENEE SMITH, as Administratrix of the Estate of RUFUS A. SMITH, SR., Deceased, as Guardian Ad Litem for the minor children of the Deceased, and individually; and MARCUS SMITH, a minor; NETRA SMITH, a minor; ANTHONY SMITH, a minor; JARREN SMITH, a minor; SHERRI SMITH, a minor; ARKILLIUS SMITH, a minor; and TASHIEKA SMITH, a minor,

Plaintiffs-Appellants,

v.

THE CITY OF FONTANA, a municipal corporation; ROBERT MEJIA; LARRY SMITH; NATHAN A. SIMON; CHARLES A. KOEHLER; BEN ABERNATHY; BILL FREEMAN; DONALD F. DAY; WILLIAM FRAGNESS; JACK RATELLE; JOHN M. RAGER; and KATHY WILSON,

Defendants-Appellees.

FILED - JULY 7, 1987

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

No. 82-5896
D.C. No. CV 82-3262-WPG

ORDER

Before: TANG,* ALARCON and NORRIS, Circuit Judges

The Amended Opinion filed on May 5, 1987, is hereby amended as follows:

Footnote 18 at page 24 of the slip opinion is deleted in its entirety.

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* Judge Tang was selected to sit on this panel following the death of the Honorable William G. East, Senior United States District Judge for the District of Oregon, originally sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SONJA RENEE SMITH, as Administratrix of the State of RUFUS A. SMITH, SR., Deceased, as Guardian Ad Litem for the minor children of the Deceased, and individually; and MARCUS SMITH, a minor; NETRA SMITH, a minor; ANTHONY SMITH, a minor; JARREN SMITH, a minor; SHERRI SMITH, a minor; ARKILLIUS SMITH, a minor; and TASHIEKA SMITH, a minor,

Plaintiffs-Appellants,

v.

THE CITY OF FONTANA, a municipal corporation; ROBERT MEJIA; LARRY SMITH; NATHAN A. SIMON; CHARLES A. KOEHLER; BEN ABERNATHY; BILL FREEMAN; DONALD F. DAY; WILLIAM FRAGNESS; JACK RATELLE; JOHN M. RAGER; and KATHY WILSON,

Defendants-Appellees.

No. 82-5896
D.C. No.
C.V. 82-3262-WPG

ORDER AND AMENDED OPINION

Submitted July 7, 1983*
Pasadena, California
Resubmitted May 27, 1986

Filed January 6, 1987
Amended May 5, 1987

Before: Thomas Tang,** Arthur L. Alarcon and William A. Norris, Circuit Judges.

Opinion by Judge Norris; Concurrence and Dissent by Judge Alarcon

Appeal from the United States District Court for the Central District of California
William P. Gray,
District Judge, Presiding

---

*The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 3(f) and Fed.R.App.P.34(a).

**Judge Tang was selected to sit on this panel following the death of the Honorable William G. East, Senior United States District Judge for the District of Oregon, originally sitting by designation.

SUMMARY

Civil Rights

Appeal from dismissal of action. Reversed and remanded.

This action arises from the death of appellant Rufus A. Smith at the hands of Appellees Mejia and Larry Smith, officers of appellee City of Fontana Police Department, during an investigation of an alleged domestic quarrel. Appellants brought suit claiming that appellees' conduct violated the first, fifth and eighth amendments and both the due process and equal protection clauses of the fourteenth amendment. Appellant Sonja Smith sued as administratrix of the decedent's estate to vindicate Smith's civil rights, and with the other

appellants sue in their capacities as adult or minor children of Smith to vindicate their own rights. Relying on two recently decided Supreme Court decisions, the district court dismissed the action in its entirety for failure to state a claim on the ground that California's post-deprivation remedies for violations of state tort law were adequate to protect appellants from suffering any cognizable constitutional injury.

[1] A recent Supreme Court decision has determined when a state's post-deprivation remedies are adequate to protect a victim's procedural due process rights. [2] Substantive due process bars certain arbitrary government actions regardless of the fairness

of the procedures used to implement them. [3] Dismissal of appellants' civil rights claims was improper to the extent that the complaint state valid claims for relief for violations of substantive rather than procedural constitutional rights.

[4] An allegation that force used during a personal seizure was excessive states a claim for relief under the civil rights laws predicated upon the fourth amendment. [5] A civil rights claim that accrued before death survives the decedent when state law authorizes a survival action as a suitable remedy not inconsistent with the Constitution of the United States. [6] The Supreme Court has held that fourth amendment rights are personal rights which may not

be vicariously asserted. The children were not directly subjected to the use of state force and therefore cannot maintain personal causes of action in reliance on this fourth amendment theory.

[7] The district court erred in construing this claim as alleging only in the form of excessive and brutal use of physical force constitutes a violation of substantive due process. The complaint clearly alleges that the decedent's substantive due process rights were violated and hence the estate pleads a valid due process claim. [8] This court has held that parents can challenge a state's severance of a parent-child relationship as interfering with their substantive liberty interests

in the companionship and society of their children. [9] This court recognizes that the Supreme Court cases relied upon to define the substantive liberty interest in a parent-child relationship involved suits by parents of minor children. [10] This court holds that a child's interest in her relationship with a parent is sufficiently weighty by itself to constitute a cognizable liberty interest. [11] If the facts in the complaint are proved, Mr. Smith was personally denied equal treatment solely because of his membership in a disfavored group. Accordingly, the estate may maintain a survival action for damages suffered by Mr. Smith as a result of the shooting incident. [12] It is clear in this case that the children have failed to

demonstrate that threat of future injury is both real and immediate with respect to either their claim for injunctive relief against the officers or their claim for declaratory relief against the City. [13] However, it is not clear from the record that the children could not plead facts showing credible threat of future injury from Fontana police officers. Therefore, this court grants the children leave to amend their complaint on remand. [13] The first, fifth, and eight amendment claims were all properly dismissed because appellants fail to state a claim for relief with respect to these rights.

COUNSEL

Andrena G. Dancer, Upland, California, for the plaintiffs-appellants.

Cotkin, Collins & Koltz, Bradley C. Withers and David L. Shain, Los Angeles, California, for the defendants.

ORDER

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P.35(b).

The petition for rehearing is **DENIED**, and the suggestion for a rehearing en banc is **REJECTED.**

The Opinion filed on January 6, 1987 is hereby replaced by the following Amended Majority and Concurring and Dissenting Opinions.

OPINION

NORRIS, Circuit Judge:

Plaintiffs filed this civil rights action under 42 U.S.C. § 1983 (1982) and other provisions of the Civil Rights Act. The district court dismissed their complaint for failure to state a claim on the ground that relief under section 1983 was barred by Parratt v. Taylor, 451 U.S. 527 (1981), and Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345 (9th Cir. 1981), aff'd on other grounds sub nom. Kush v. Rutledge, 460 U.S. 719 (1983). We reverse on the basis of

recent Supreme Court and Ninth Circuit authority holding that Parratt and its progeny are inapplicable to civil rights actions asserting substantive as opposed to purely procedural due process violations.[1/]

I

FACTS AND PROCEDURAL HISTORY

According to the plaintiffs' complaint, City of Fontana police officers Robert Mejia and Larry Smith responded to a call concerning a domestic quarrel at the apartment of

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1/We temporarily vacated submission of the plaintiffs' appeal in order to await the decision of the Supreme Court in Daniels v. Williams, 106 S.Ct. 662 (1986), and the decisions of an en banc panel of this court in Piatt v. MacDougall, 773 F.2d 1032 (9th Cir. 1985)(en banc), Bretz v. Kelman, 773 F.2d 1026 (9th Cir. 1985)(en banc), and Haygood v. Younger, 769 F.2d 1350 (9th Cir. 1985)(en banc), cert. denied sub nom. Cranke v. Haygood, 106 S.Ct. 3333 (1986).

Rufus A. Smith, Sr. on May 27, 1982. Encountering Mr. Smith in his parking lot, the officers asked him to place his hands on his head and detained him in order to discuss the alleged incident. As Mr. Smith attempted to comply, Officer Smith without provocation clenched him from behind in a chokehold and began to drag him backwards. While Mr. Smith was thus being held, Officer Mejia without provocation began to knee him in the groin and strike him in the face. Though Mr. Smith was unarmed and offered only instinctive resistance against the blows to his groin and face, Officer Smith drew his duty revolver and shot Mr. Smith in the back. Mr. Smith died approximately one and a half hours later during emergency surgery.
Mr. Smith was a black man.

Plaintiffs brought suit in federal district court under 42 U.S.C. §1983[2] against officers Mejia and Smith, the City of Fontana, and various city officials,[3] claiming that the defendants' conduct violated the First,

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2/ 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3/ These city officials include the Mayor, Mayor Pro-Tem, Chief of Police, City Manager, City Attorney, City Personnel Director, and members of the City Council. The complaint alleges that they all are responsible either for developing and enforcing adequate standards for the hiring, training, and supervising of police officers or for rendering legal advice to other officials charged with such supervision.

Fourth, Fifth, and Eighth Amendments and both the due process and equal protection clauses of the Fourteenth Amendment. Plaintiff Sonja Smith, suing in her capacity as administratrix of the decedent's estate, seeks to vindicate Mr. Smith's personal civil rights. She and the other plaintiffs also sue in their capacities as adult or minor children of Mr. Smith, seeking to vindicate their own personal rights.

Relying on the then recently-decided Parratt v. Taylor and Rutledge v. Arizona Bd. of Regents, the district court dismissed the action in its entirety for failure to state a claim on the ground that California's post-deprivation remedies for violations of state tort laws were adequate to protect

the plaintiffs from suffering any cognizable constitutional injury.[4/]

II

LIMITATIONS ON PARRATT AND ITS PROGENY

[1] In Parratt v. Taylor, the Supreme Court held that when a state actor negligently deprived a prisoner of a minor property interest through a "random and unauthorized" act, the state's provision of an adequate post-deprivation remedy satisfied the

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4/The plaintiffs also asserted claims for relief under 42 U.S.C. §§ 1981, 1985(2) and 1985(3) and joined several pendent state claims. The district court treated separately the section 1985 claims, holding that based on the facts alleged in the complaint the plaintiffs "can[not] state a cause of action with respect to conspiracy." The plaintiffs apparently do not appeal this part of the district court's ruling, and hence we do not review it. The district court dismissed the pendent state claims as well.

constitutional requisite of procedural due process. 451 U.S. at 541-44. The district court apparently understood Parratt to preclude any section 1983 action based on an official's "random and unauthorized" deprivation of a constitutional right when a state provides adequate post-deprivation remedies. However, Parratt and its progeny merely determine when a state's post-deprivation remedies are adequate to protect a victim's procedural due process rights. The Parratt line of cases does not focus on the relevance of procedural protections to alleged violations of substantive constitutional rights. As Justice Stevens recently noted in his concurrence in Daniels v. Williams, 106 S.Ct. 662 (1986), the due process clause of the Fourteenth

Amendment "is the source of three different kinds of constitutional protection. First, it incorporates specific provisions defined in the Bill of Rights." 106 S.Ct. at 677 (separate opinion of Stevens, J., concurring in the judgment). Actions which violate these specific substantive protections of the Bill of Rights lie outside the scope of Parratt because the constitutional violation is complete at the moment the action or deprivation occurs, rather than at the time the state fails to provide requisite procedural safeguards surrounding the action. Hence, Parratt is inapplicable to alleged violations of one of the substantive provisions of the Bill of Rights, such as the Fourth Amendment. See Daniels, 106 S.Ct. at 678 (separate opinion of

Stevens, J.)("If the claim [concerns a] . . . violation of one of the specific constitutional guarantees of the Bill of Rights[], a plaintiff may invoke § 1983 regardless of the availability of a state remedy."); see also Robins v. Harum, 773 F.2d 1004, 1009 (9th Cir. 1985) (Parratt's focus on post-deprivation remedies simply "is not applicable to a claim, such as the instant excessive use of force claim, brought under the Fourth Amendment").

[2] The due process clause also "contains a substantive component, sometimes referred to as 'substantive due process,' which bars certain arbitrary government actions 'regardless of the fairness of the procedures used to implement them.'" Daniels, 106 S.Ct.

at 678 (separate opinion of Stevens, J.) (citation omitted). Writing for the Court in Daniels, Chief Justice Rehnquist recently reaffirmed this understanding that the due process secures both procedural and substantive constitutional protections:

> By requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property," the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, it serves to prevent governmental power from being "used for purposes of oppression."

Id. at 665 (citations omitted). Like specific provisions of the Bill of Rights, "substantive due process is violated at the moment the harm occurs [and therefore] the existence of a post-

deprivation state remedy should not have any bearing on whether a cause of action exists under § 1983." Rutherford v. City of Berkeley, 780 F.2d 1444, 1447 (9th Cir. 1986). See Shah v. County of Los Angeles, 797 F.2d 743, 746 (9th Cir. 1986); McRorie v. Shimoda, 795 F.2d 780, 785-86 (9th Cir. 1986); Gaut v. Sunn, 792 F.2d 874, 876 (9th Cir. 1986); Mann v. City of Tucson, 782 F.2d 790, 792-93 (9th Cir. 1986); see also Daniels, 106 S.Ct. at 678 (separate opinion of Stevens, J.).

Only claims lying within the third category of constitutional protections - procedural protections against wrongful deprivations of life, liberty or property - fall within the scope of the Parratt doctrine. Constitutional

violations of procedural due process occur not at the moment of the deprivation, but only when the State fails to provide adequate procedures to protect against wrongful deprivations. Id. at 678-79.

[3] Dismissal of the plaintiffs' section 1983 claims was therefore improper to the extent that the complaint stated valid claims for relief for violations of substantive rather than procedural constitutional rights.[5/]

[5/] Liability under section 1983 lies where (1) "the conduct complained of was committed by a person acting under color of state law; and (2) . . . this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." Parratt, 451 U.S. at 535. There is no dispute here that the alleged conduct by officers Mejia and Smith satisfies the "under color of state law" requirement, as they "were clothed with the legiti-

(continued...)

We address each of the constitutional claims asserted by each of the plaintiffs in turn, reviewing the claims de novo. Guillory v. County of Orange, 731 F.2d 1379, 1381 (9th Cir. 1984). In conducting this review we presume that the facts alleged in the complaint are true and construe them in the light most favorable to the appellant. North Star Intern. v. Arizona Corp. Comm'n, 720 F.2d 578, 580 (9th Cir. 1983). Dismissal is improper "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Franklin v. Oregon, 662 F.2d 1337, 1343

5/ (...continued)
macy of the government and were purporting to act thereunder." Haygood, 769 F.2d at 1354. We thus focus solely on whether the plaintiffs have been deprived of any constitutional rights.

(9th Cir. 1981) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

III

FOURTH AMENDMENT CLAIMS

[4] The estate's first legal theory is that the officers' actions and the City's policies violated Mr. Smith's Fourth Amendment rights. In Tennessee v. Garner, the Supreme Court held that "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."[6/] U.S. 1, 7 (1985). Where a victim of a seizure alleges that officers unreasonably employed excessive

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6/The Fourth Amendment made applicable to the states through the Fourteenth Amendment in Wolf v. Colorado, 338 U.S. 25 (1949), states in part that the "right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. amend. IV.

force under the circumstances in order to detain or subdue her, the "reasonableness of force should be analyzed in light of such factors as the requirements for the officers' safety, the motivation for the arrest [or detention], and the extent of the injury inflicted." McKenzie v. Lamb, 738 F.2d 1005, 1011 (9th Cir. 1984). Hence, an allegation that force used during a personal seizure was excessive as measured by these factors states a claim for relief under section 1983 predicated upon the Fourth Amendment. See Garner, 471 U.S. at 9 (use of deadly force to prevent escape constitutes an unreasonable seizure unless the officer has probable cause to believe that the suspect poses a threat of serious harm to the officer or others); Robins, 773

F.2d at 1008-10 (allegation that police used excessive force while transporting plaintiffs to police station after arrest states a section 1983 claim for a Fourth Amendment violation); MacDonald v. Musick, 425 F.2d 373, 377 (9th Cir.) (defendant asserting that his arrest was unlawful, that he had a right to resist, and that he sustained injuries as a result of his resistance stated claim under section 1983), cert. denied, 400 U.S. 852 (1970); see also Gilmere v. City of Atlanta, 774 F.2d 1495, 1502 (11th Cir. 1985) (alleged beating and killing of suspect during process of detention stated a section 1983 claim for Fourth Amendment violation), cert. denied, 106 S.Ct. 1970 (1986). The defendants candidly concede that under this case law the complaint's allega-

tions that the decedent was "unarmed and helpless, and in no way posed a threat to the safety of [the officers or] any other persons," Complaint, at ¶ 30, and that the defendants' acts were "unwarranted, cruel, inhuman, unjustifiable, and excessive," id., at ¶ 33, are sufficient to state a claim under the Fourth Amendment. See Appellees' Supplemental Brief, at 2.

[5] The estate can assert this claim on Mr. Smith's behalf. Under section 1988, a section 1983 claim that accrued before death survives the decedent when state law authorizes a survival action as a "suitable remed[y] . . . not inconsistent with the Constitution and laws of the United States . . . ." 42 U.S.C. §1988 (1982). See Robertson v.

Wegmann, 436 U.S. 584, 588-90 (1978). Under California's survival statute, "no cause of action [is] lost by reason of the death of any person but may be maintained by . . . his . . . administrator." Cal. Prob. Code §573 (West Supp. 1986).[7] Therefore, Mr. Smith's Fourth Amendment claim survives his death and can be maintained by plaintiff Sonja Smith in her capacity as administratrix of his estate.[8]

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[7] As an exception to this rule, survival actions may not be brought in California if the decedent's death is instantaneous with her legal injury; see Pease v. Beech Aircraft, 38 Cal.App.3d 450, 459-60, 113 Cal.Rptr. 416, 422-23 (1974), but the complaint here alleges that Mr. Smith died approximately one and one-half hours after he was shot.

[8] We express no view here as to whether the remedies authorized by California's survival statute, pecuniary and punitive damages but not damages for pain and suffering, are too limited to be "consistent" with the Civil Rights Act's

(continued...)

[6] Mr. Smith's children, suing in their individual capacities, also assert a claim for relief under the Fourth Amendment. However, the Supreme Court has held that "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." Alderman v. United States, 394 U.S. 165, 174 (1969).

8/(...continued)
statutory scheme and whether federal law, therefore, provides an independent source of recovery for a broader array of damages. See generally Robertson, 436 U.S. at 594 (explicitly holding question open); Guyton v. Phillips, 532 F.Supp. 1154, 1165-67 (N.D.Cal. 1981) (interpreting federal law as allowing estate to recover compensation for decedent's pain and suffering and for his loss of life itself even though such compensation is unavailable under California's survival statute); Bass by Lewis v. Wallenstein, 769 F.2d 1173, 1187-90 (7th Cir. 1985) (holding Illinois' limited recovery under survival and wrongful death statutes inconsistent with federal law and authorizing awards of damages beyond those expressly provided); Bell v. City of Milwaukee, 746 F.2d 1205, 1235-41, 1250-53 (7th Cir. 1984) (same conclusion with respect to Wisconsin law).

The children were not directly subjected to the excessive use of state force and therefore cannot maintain personal causes of action under section 1983 in reliance on this Fourth Amendment theory.

IV

SUBSTANTIVE DUE PROCESS CLAIMS

A. The Estate's Substantive Due Process Claim

[7] The estate asserts a section 1983 claim under the due process clause of the Fourteenth Amendment. The district court erred in construing this claim as alleging only a procedural due process violation because egregious government conduct in the form of excessive and brutal use of physical force constitutes a violation of substantive due process. See Rutherford, 780 F.2d at 1446

(allegation of unprovoked assault and battery by police officers states a claim for violation of substantive due process); see also Shah, 797 F.2d at 746 ("'intentional unjustified, [and] unprovoked' assault by a prison guard on a prisoner may be a violation of substantive due process") (citation omitted); McRorie, 795 F.2d at 785 (allegation of intentional prison guard brutality states cause of action for substantive due process violation); Gaut, 792 F.2d at 875 (prison beatings which "shock the conscience" are actionable as substantive due process violations); Meredith v. Arizona, 523 F.2d 481, 482-84 (9th Cir. 1975) (assault and battery by prison guard violates the right to liberty). As with the Fourth Amendment claim, resolving a

substantive due process claim requires courts to balance several factors focusing on the reasonableness of the officers' actions given the circumstances. In Rutherford, we held that

> "in determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm."

780 F.2d at 1446 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d. Cir. 1973)). Given its focus on these factors, the complaint clearly alleges that Mr. Smith's substantive due process rights were violated and hence the

estate pleads a valid due process claim under section 1983.

B. The Children's Personal Substantive Due Process Claim

The children also plead that the defendants violated their personal "rights not to be deprived of the life of their father and not to be deprived of his love, comfort, and support . . . ." Complaint, at paragraph 40. This claim raises the threshold question whether the children's interest in the continued companionship and society of their father is a cognizable liberty interest under the due process clause.

[8] The Supreme Court has yet to address whether and when the government's act of taking the life of one family member deprives other family members of a cognizable liberty interest

in continued association with the decedent. Our court, however, has held that parents can challenge under section 1983 a state's severance of a parent-child relationship as interfering with their liberty interests in the companionship and society of their children. In Morrison v. Jones, 607 F.2d 1269 (9th Cir. 1979), cert. denied, 445 U.S. 962 (1980), we held that when county officials removed a mentally ill boy from his mother's custody on the ground that she could not adequately care for him, the mother could bring a section 1983 action for damages to vindicate her "substantive familial rights that have long been considered the 'basic civil rights of man.'" Id. at 1276 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)). More recently, in

Kelson v. City of Springfield, 767 F.2d 651 (9th Cir. 1985), we held that parents who alleged that school officials negligently allowed their son to commit suicide could maintain a section 1983 action to vindicate "their fundamental parental rights guaranteed by the Ninth Amendment . . . and . . . their right to association with their son guaranteed by the First Amendment." Id. at 653. After examining a long line of Supreme Court cases stressing "the importance of familial bonds" and identifying the many times the Supreme Court has interpreted the due process clause to protect the interests of parents "in maintaining a relationship with their children," id. at 654, we concluded that "a parent has a constitutionally protected liberty interest in

the companionship and society of his or her child." Id. at 655.9/

We now hold that this constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents. The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal, and we see no reason to accord less constitutional value of the

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9/After Kelson was decided, the Supreme Court ruled that the "Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty or property. Daniels, 106 S.Ct. at 663. Although Daniels overrules Kelson's implicit holding that a section 1983 claim can be based on mere negligence, Kelson's determination that parents have a constitutionally protected liberty interest in their continued association with their children remains good law.

child-parent relationship than we accord to the parent-child relationship.[10/] Cf. Roberts v. United States Jaycees, 468 U.S. 609, 619-20 (1984) ("Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individual with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.").

[9] We recognize that the Supreme Court cases on which Morrison and Kelson relied to define the liberty interest in

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10/Indeed, if any distinction can be drawn, one might even argue that a child has a greater interest in the continued life of a biological parent than vice versa because often the parent has or can have other biological children, whereas a child can never replace a biological parent.

a parent-child relationship involved suits by parents of minor children. The state's interference with the parent-child relationship therefore threatened not only the parents' interest in the companionship of their children, but also the parents' constitutionally protected interest in raising their children. See, e.g., Santosky v. Kramer, 455 U.S. 745 (1982) (natural parents entitled to procedural due process at a state-initiated parental rights termination proceeding); Lassiter v. Dep't of Social Services, 452 U.S. 18 (1981) (parents entitled to procedural due process prior to state termination of parental status on grounds of unfitness); see also Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (requirement that children attend public

school unreasonably interferes with parents' liberty "to direct the upbringing and education of children under their control").

[10] When, as in this case, a child claims constitutional protection for her relationship with a parent, there is no custodial interest implicated, but only a companionship interest. This distinction between the parent-child and the child-parent relationships does not, however, justify constitutional protection for one but not the other. We hold that a child's interest in her relationship with a parent is sufficiently weighty by itself to constitute a cognizable liberty interest. Our view finds support in Strandberg v. City of Helena, 791 F.2d 744 (9th Cir. 1986),

where parents brought a section 1983 claim against the state for negligently allowing their son to commit suicide in jail. The parents' interest in directing the upbringing of their son was not implicated because the son was twenty-two years old and no longer a minor; the parents therefore "had not been deprived of any constitutional right to parent." Id. at 748 n.1 (emphasis added). However, the parents were able to "claim a violation of their fourteenth amendment due process rights in the companionship and society of the decedent." Id. at 748. Thus, the familial relationship, and not the more narrow custodial interest of the parents, gave rise to the due process action. See also Bell, 746 F.2d at 1245 (parent can assert personal due process

claim for death of adult child because the "Supreme Court's decisions protect more than the custody dimension of the parent-child relationship"); cf. Moore v. City of East Cleveland, 431 U.S. 494 (1977) (extending Supreme Court principles protecting the parental role in raising children to protect a broader set of relationships within the family structure and invalidating under substantive due process a zoning ordinance preventing grandmother and grandson from living together in certain circumstances).11/

11/We intimate no view as to whether the familial relationship between siblings is sufficiently constitutionally protected as to allow one sibling to assert a section 1983 action based on the death of the other. Compare Trujillo v. County Commissioners, 768 F.2d 1186 (10th Cir. 1985) (siblings can bring section 1983 claims alleging that wrongful death interfered with liberty

(continued...)

Our conclusion also finds compelling support in the legislative history of section 1983's precursor, the Ku Klux Klan Act of 1871. Representative Butler described the Act "as a remedy for wrongs, arsons, and murders done. This is what we offer to a man whose house has been burned, as a remedy; to the woman whose husband has been murdered, as a remedy; to the children whose father has been killed, as a remedy." Cong. Globe, 42nd Cong., 1st Sess. 807 (1871) (emphasis added). Indeed, the "legislative history makes a clearer case for recovery to the child due to loss of support or loss of society and companionship of a parent . . . [than for] the parent's rights [for recovery]

11/ (...continued)
interest in companionship), with Bell, 746 F.2d 1205 (siblings cannot do so).

vis-a-vis the loss of a child." Bell, 746 F.2d at 1244 (emphasis added). Both case law and legislative history thus lead us to the conclusion that Mr. Smith's adult and minor children had a cognizable liberty interest in their relationship with their father.

This leaves us with the question of whether the alleged interference with the children's protected liberty interest rises to the level of a substantive, as opposed to a procedural, due process violation. As we have already noted, whether a particular interference with a liberty interest constitutes a substantive or a procedural due process violation depends on whether the interference was "for purposes of oppression," Daniels, 106

S.Ct. at 665 (citation omitted), rather than for the purpose of furthering legitimate state interests. When the state has a legitimate interest in interfering with a parent-child relationship, for example, where the best interest of the child arguably warrants termination of the parent's custodial rights, the state may legitimately interfere so long as it provides "fundamentally fair procedures." Kramer, 455 U.S. at 754 (emphasis added). However, the state has no legitimate interest in interfering with this liberty interest through the use of excessive force by police officers. Such an action constitutes the very sort of affirmative abuse of government power which the substantive protections of the due process clause are designed to

prevent. Therefore, the same allegation of excessive force giving rise to Mr. Smith's substantive due process claim based on his loss of life also gives the children a substantive due process claim based on their loss of his companionship.[12/] Because on these facts

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12/One circuit has imposed a special state-of-mind requirement for a due process violation when the liberty interest giving rise to the section 1983 action is the interest in continued familial companionship. In Trujillo, the Tenth Circuit likened this liberty interest to the First Amendment interest in free association and noted that to state a claim for interference with this First Amendment interest, a plaintiff must allege that the challenged statute or official action was directed at discouraging protected expression or association. 768 F.2d at 1189-90. The court then held that plaintiffs who bring a section 1983 claim based on interference with familiar companionship similarly must allege that the state official acted with the specific motive of severing the parent-child relationship in some manner, for example, terminating a parent's custodial rights. See Trujillo, 768 F.2d at 1190. However,

(continued...)

their claim invokes the protections of substantive due process, the claim falls outside the scope of the Parratt doctrine.

12/(...continued)
Trujillo imposed this requirement of specific intent on a claim of interference with the familial relationship in order to avoid throwing open the judicial floodgates to claims based on merely negligent acts. Id. Now that Daniels has closed this potential floodgate by requiring the act causing the deprivation to have been more than simply negligent, see supra note _____, Trujillo's additional focus on the state actor's motivation is no longer necessary to serve its purpose. We therefore decline to follow Trujillo. As long as the state official's action which deprived the plaintiffs of their liberty was more than merely negligent, the plaintiffs can state a section 1983 claim without further alleging that the official was trying to break up their family. We note that we did not adopt a specific intent requirement in Kelson. See also Bell, 746 F.2d 1205 (not imposing specific intent state-of-mind requirement).

V

EQUAL PROTECTION CLAIMS

[11] The complaint alleges that officers Smith and Mejia used excessive force to subdue decedent Mr. Smith because he was black. The complaint further alleges that the officers acted pursuant to an unwritten City policy authorizing the use of excessive force, particularly against black persons, and that the City also had a policy of failing to train and supervise police officers concerning the use of deadly force.[13] If these facts are proved,

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[13] Specifically, the two unwritten policies averred in the complaint are the failure of the institutional defendants to enforce departmental regulations, thereby creating an "atmosphere of lawlessness," and the "failure of the defendants to provide training, instruction and supervision regarding the lawful use of an officer's service revolver and the use of excess-

(continued...)

Mr. Smith was "personally denied equal treatment solely because of [his] membership in a disfavored group." Heckler v. Mathews, 465 U.S. 728, 740 (1984). Accordingly, the estate may maintain a survival action against all defendants for damages suffered by Mr. Smith as a result of the shooting incident.[14]

13/ (...continued)
sive and deadly force." Complaint, at ¶¶ 49-50. Both of these allegations are sufficient to satisfy the definition of an "official policy" giving rise to municipal liability as articulated by the Supreme Court in Monell v. Dep't of Social Services, 436 U.S. 658, 694 (1978). See Bergquist v. County of Cochise, 806 F.2d 1364, 1370 (9th Cir. 1986) ("policy of gross negligence in training or supervision gives rise to § 1983 liability").

14/ The complaint sufficiently alleges a causal relationship between the City's unconstitutional policies and the officers' actions to satisfy the Supreme Court's requirement that plaintiffs allege (and later prove) an "affirmative (continued...)

The children also assert an equal protection challenge, focusing not on the shooting incident itself,[15] but rather on the possibility that similar race-based incidents will occur in the future. Specifically, the children allege that the propensity of officers Mejia and Smith to employ excessive force against black residents in the future and the City's and supervisory

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14/(...continued)
link between the occurrence of the . . . police misconduct and the adoption of any policy or plan by . . . [the officials] - express or otherwise - showing their authorization or approval of such misconduct." Rizzo v. Goode, 423 U.S. 362, 371 (1976).

15/We do not address the difficult question whether the children could state a claim for damages under the equal protection clause based on the police shooting of their father. We do not interpret their complaint as pleading this claim, and they have not raised it in their briefs filed with this court.

officials' sanction and encouragement of such a practice by all City police officers threaten the physical security of all black people within the jurisdiction of the Fontana Police Department. Fearing future injury at the hands of the Fontana police because of their race, the children seek injunctive relief against the continued employment of officers Mejia and Smith in any capacity where the officers would be armed and seek a declaratory judgment that the City's discriminatory policy is unconstitutional.

[12] We do not reach the question whether these facts, if proved, would state a claim under the equal protection clause, for we find ourselves without jurisdiction to consider such a claim.

In City of Los Angeles v. Lyons, 461 U.S. 95 (1983), the Supreme Court explained that Article III's "case or controversy" requirement precludes federal courts from considering claims for equitable relief unless the plaintiffs can demonstrate that their threat of future injury by the defendants is "both 'real and immediate,' not 'conjectural or hypothetical.'" 461 U.S. at 102 (citations omitted).16/ It is difficult

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16/We note that the Supreme Court, both in Lyons and other opinions, has characterized this Article III requirement in several different ways. See, e.g., Lyons, 461 U.S. at 101 ("case or controversy" requirement); id. at 105 ("standing" to seek injunction); id. at 111 ("prerequisite of equitable relief"). See also Kolender v. Lawson, 461 U.S. 352, 355 n.3 (1983) (referring separately to the "propriety of declaratory and injunctive relief" and "standing to seek such relief") but concluding that both are satisfied by plaintiff's showing of "credible threat" of recurring injury). Despite this

(continued...)

to characterize the point at which a threat of future injury becomes "credible," and the caselaw defies easy generalization. See, e.g., Sample v. Johnson, 771 F.2d 1335, 1340-43 (9th Cir. 1985) (canvassing cases). Nevertheless, it is clear in this case that the children have failed to meet this burden with respect to either their claim for injunctive relief against officers Smith and Mejia or their claim for declaratory relief against the City.[17]

16/ (...continued)
confusion of terminology, however, it is clear that the Court considers a satisfactory allegation of a credible threat of future injury to be a prerequisite to the exercise of federal jurisdiction over a claim for injunctive relief.

17/ While Lyons itself concerned a claim for injunctive and not merely declaratory relief, 461 U.S. at 98-99, the Supreme court seems to employ the same threshold test of likelihood of
(continued...)

The Supreme Court has held that plaintiffs seeking equitable relief from assertedly unconstitutional police practices can satisfy this case or controversy requirement by alleging enough specific instances of past unconstitutional behavior to establish a "persistent pattern of police misconduct" from which a future threat can be inferred. Allee v. Medrano, 416 U.S. 802, 815 (1974). Here, however, the complaint cites no examples of police abuse other than the one causing the death of Mr. Smith. Rather, the complaint merely alleges that black

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17/ (...continued)
recurring injury when evaluating claims for declaratory relief as it does when evaluating claims for injunctive relief. See, e.g., Ashcroft v. Mattis, 431 U.S. 171, 172 & n.2 (1977) (per curiam); Golden v. Zwickler, 394 U.S. 103, 108-10 (1969).

citizens "have consistently been the targets of unpunished, arbitrary, and discriminatory use of excessive and deadly force by Fontana police officers." Complaint, at ¶ 49. This statement is too conclusory to adequately establish a prior pattern of misconduct from which we can infer a credible threat of future injury at the hands of Fontana police officers. A fortiori, it fails to establish a credible threat of recurrent injury inflicted specifically by officers smith and Mejia. See Lyons, 461 U.S. at 100 (claim of future injury too speculative where complaint alleged that police policy of applying chokeholds had resulted in twelve deaths and five more deaths occurred after complaint was filed).

The Supreme Court has held that plaintiffs seeking equitable relief can alternatively satisfy this case or controversy requirement of likely future injury by both alleging the existence of an unconstitutional policy and "credibly alleg[ing] that [they] faced a realistic threat from the future application of the City's policy." Lyons, 461 U.S. at 107 n.7. In Lyons, for example, the Supreme Court indicated that Lyons would have to allege that he was likely to engage in some act bringing him into contact with the police in a situation where the City's policy would lead the policy to apply a chokehold. Id. at 105-108 & n.7. Here, the plaintiffs do make the general allegation that the City's unconstitutional policies authorize and encourage all police officers to use

excessive force, especially against black persons. They further allege that the continued employment of officers Smith and Mejia "presents a clear and present danger to all citizens of the City of Fontana and could result in the further illegal use of force and violence by the defendants." Complaint, at ¶ 91. However, nowhere do they specify under what circumstances the City's policy authorizes police officers unjustifiably to employ deadly force against black persons, nor do they explain why they likely will find themselves in such circumstances. They do not even suggest that they are likely to be involved in the same type of family quarrel which led officers Smith and Mejia to approach and restrain their father. We therefore cannot find in

their allegations a sufficiently credible threat of future injury to establish an Article III "case or controversy" under the guidelines established by the Supreme Court.

We have previously held that Lyons and its progeny does not preclude the exercise of federal jurisdiction when a plaintiff brings both a claim for damages and a related claim for equitable relief in the same lawsuit. In Giles v. Ackerman, 746 F.2d 614 (9th Cir. 1984), a woman who was subject to a strip search after being arrested for failure to pay several outstanding parking tickets brought a section 1983 claim against several county defendants based on their alleged violation of her fourth amendment rights. She sought

damages for her actual privacy invasion, a declaratory judgment that the county's policy of strip searching was constitutional, and injunctive relief against the policy's continued enforcement. In response to the suggestion that she could not credibly assert that she again would be subjected to a strip search and that therefore she had no standing to seek declaratory or injunctive relief, we reasoned as follows:

> "In Lyons the plaintiff's damages claim had been severed from his claim for injunctive relief. The [Supreme] Court was thus required to consider whether his request for an injunction, standing alone, presented a case or

> controversy. In contrast, it is clear that Giles has standing to bring her damages action, and there is no question that a live controversy exists between her and the County. The only question in her case is whether relief in addition to damages is appropriate.

746 F.2d at 619 (citations omitted).

We have concluded here that the children can maintain an action for damages against the City defendants based on their alleged violation of the children's substantive due process rights. Ante, at _____. However, we do not believe that our reasoning in Giles leads to the conclusion that this due process claim for damages allows us

to exercise federal jurisdiction over the children's equal protection claim for equitable relief. In Giles, the plaintiff's claims for damages and equitable relief were predicated on a single legal theory requiring development of the exact same set of facts - that her strip search after arrest for a minor crime violated her Fourth Amendment rights. Giles had to establish all of the facts necessary to support her claim for equitable relief in order to win her damages claim, and therefore she "demonstrate[d] a 'personal stake in the outcome'" of her claim for equitable relief sufficient to "'assure that concrete adverseness' necessary for the proper resolution of constitutional questions." Lyons, 461 U.S. at 101 (citations omitted).

In contrast, for the children to win their claim for equitable relief based on the City's alleged violation of the equal protection clause, the children would have to prove facts additional to those sufficient to win their due process claim for damages. The children can establish the City's liability for damages by showing that the City's official policy authorizes the use of excessive force and that this policy was causally related to their father's death at the hands of officers Smith and Mejia. To win their claim for equitable relief, however, the children would have to prove that the City's policy concerning the use of force discriminates against black citizens. Unlike in Giles, therefore, the plaintiffs' damages claim does not by itself guarantee the

requisite adverseness with respect to the equal protection claim to satisfy the requirement of a "live controversy" Giles, 746 F.2d at 619. Interpreting Giles in light of Lyons, we believe that we must limit the exception established in Giles - that plaintiffs need not allege a credible threat of future injury in order to maintain a claim for equitable relief as long as they also have a claim for damages - to situations where the two claims involve the same operative facts and legal theory. The children here therefore cannot use their due process claim for damages to satisfy the independent "case or controversy" requirement governing their claims for equitable relief.18/

18/To be sure, the estate has a valid claim for damages against the City

(continued...)

[13] Although the allegations presently contained in the complaint fail to establish a "case or controversy" permitting the exercise of federal jurisdiction over the children's equal protection claims for equitable relief, it is not clear from the record that the children could not plead facts showing a credible threat of future injury at the hands of officers Smith and Mejia or other Fontana police officers. Because the complaint was

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18/ (...continued)
defendants based on the equal protection clause, see ante at _____, and therefore the City defendants must be prepared to defend themselves against the equal protection challenge. However, just as each individual plaintiff in a lawsuit joining several plaintiffs must independently satisfy constitutional standing requirements, so must each individual seeking injunctive relief satisfy the Article III "case or controversy" requirement to seek such relief.

filed before Lyons was decided, and because the district court never reached this question, we believe that the interests of justice require granting the plaintiffs leave to amend their complaint on remand. Cf. Kelson, 767 F.2d at 656 (plaintiffs afforded opportunity to amend complaint on remand to allege existence of official policy or custom when Supreme Court decided case refining definition of official policy after plaintiffs filed original deficient complaint); Hirst v. Gertzen, 676 F.2d 1252, 1264-65 (9th Cir. 1982) (plaintiff afforded opportunity to amend complaint on remand to allege section 1983 claim against municipal defendants when Supreme Court decided case creating municipal liability after municipal

defendants had been dismissed from the action).[19]

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[19] If on remand the district court permits the plaintiffs to amend their complaint to plead a claim for damages under the equal protection clause based on the shooting of their father, and if that claim can survive a motion to dismiss for failure to state a claim according to applicable equal protection law, a question we do not each here, see supra note _____, then Giles would control and the court could exercise jurisdiction over the children's equal protection claim for equitable relief.

Judge Alarcon's concern that the preceding discussion "appears to offer advice to the plaintiffs to assist them upon remand in curing the deficiencies in their pleadings," post, at _____, is misplaced. Our discussion of Supreme Court and Ninth Circuit case law concerning the pleading requirements for establishing federal court jurisdiction over claims for equitable relief is intended and indeed is necessary to explain what constitutes adequate allegations as a matter of law in order to justify our conclusion that the children's allegations in this particular case are legally deficient.

VI

REMAINING CONSTITUTIONAL CLAIMS

The plaintiffs also alleged violations of their First, Fifth, and Eighth Amendment rights. Because these rights are all substantive in nature, Parratt's focus on post-deprivation remedies is inapposite. However, these claims were all properly dismissed because the plaintiffs fail to state a claim for relief with respect to these rights. Except insofar as the First Amendment right to intimate association is relevant to the children's ability to assert a substantive due process claim, ante at _____, the complaint alleges no action of the officers or the city defendants that could conceivably implicate First Amendment concerns. The plaintiffs do not allege that the

officers' action or the City's policy was designed to or had the effect of interfering with the decedent's or the children's ability to exercise their rights of free speech or association. Because the Fifth Amendment claim must rest either on that Amendment's due process clause or its implicit equal protection clause, any Fifth Amendment claim is merely duplicative of the Fourteenth Amendment claims. The Eighth Amendment protects only those who have been convicted of a crime, see Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979), and therefore none of the plaintiffs can claim its protection here.20/

20/The district court did not treat separately the plaintiffs' claim that the defendants violated 42 U.S.C. § 1981 by denying them "the full and equal benefit of all laws and proceedings for the security of persons . . . as is

(continued...)

VII

CONCLUSION

We hold that Mr. Smith's estate has properly stated a section 1983 claim for damages against all defendants for violations of his Fourth Amendment rights, against all defendants for violations of his Fourteenth Amendment substantive due process rights, and against all defendants for violations of his Fourteenth Amendment equal protection rights. We also hold that Mr. Smith's children have stated a section 1983 claim for damages against

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20/ (...continued)
enjoyed by white citizens . . . ."
Because Parratt places limitations only on procedural due process actions under section 1983, Parratt does not justify dismissal of the section 1981 claim. Because the issue was not briefed on appeal, we do not address the question whether the plaintiffs state cause of action under section 1981.

all defendants for violations of their substantive due process rights and a cause of action for injunctive relief but not damages against all defendants for violations of their Fourteenth Amendment equal protection rights. The district court's dismissal of the plaintiffs' action is therefore reversed.

REVERSED AND REMANDED.

ALARCON, Circuit Judge, concurring and dissenting:

I concur in the judgment, and in Parts I, II, III, IV, VI, VII, and VIII. I dissent from that portion of Part V which appears to offer advice to the plaintiffs to assist them upon remand in

curing the deficiencies in their pleading. These suggestions are unnecessary to the opinion. They will also present clearly avoidable problems for the district court, and this court, in the event of a further appeal, in distinguishing the law of this case from gratuitous obiter dictum.

APPENDIX C

No. 82-5896

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SONJA RENEE SMITH, as Administratrix of the Estate of Rufus A. Smith, Sr., deceased, as guardian ad litem for the minor children of the deceased, and individually; RUFUS ANTHONY SMITH, JR., individually; MARCUS SMITH, minor; NETRA SMITH, a minor; ANTHONY SMITH, a minor; JARREN SMITH, a minor; SHERRI SMITH, a minor; ARKILLIUS SMITH, a minor; and TASHIEKA SMITH, a minor,	)
Plaintiffs/Appellants,	)
vs.	)
CITY OF FONTANA, a municipal corporation, ROBERT MEJIA, LARRY SMITH, NATHAN SIMON, CHARLES A. KOEHLER, BEN ABERNATHY, BILL FREEMAN, DONALD	)

F. DAY, WILLIAM KRAGNESS, JACK RATELLE, JOHN M. RAGER, and KATHY WILSON,

Defendants/Appellees.

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1987 JANUARY 20 PM 4:21

Docketed _____ _____
Date Initial

APPEAL FROM THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
HONORABLE WILLIAM P. GRAY, JUDGE PRESIDING

PETITION FOR REHEARING EN BANC

COTKIN, COLLINS & FRANSCELL
BY: BRADLEY C. WITHERS & PAUL N. PAQUETTE
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82-5896

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SONJA RENEE SMITH, et al.,

Plaintiffs/Appellants,

vs.

CITY OF FONTANA, et al.,

Defendants/Appellees.

INTRODUCTION

Appellees CITY OF FONTANA, et al., respectfully petition this court for a rehearing of this appeal en banc. The opinion in favor of appellants is erroneous on several grounds.

First, it is respectfully submitted that the court, in determining the adequacy of appellants' equal protection claims, should have performed the requisite legal analysis in order to determine whether said allegations presented an actual case or controversy under Article 3 of the United States Constitution. Absent this analysis, the court was unable to properly make this determination.

Second, the court, in determining the adequacy of the children's substantive due process claims based upon a deprivation of purely companionship and associational interests, erred in not limiting its holding to those instances in which the alleged unconstitutional conduct

deprived the decedent-parent of his or her life.

As will be demonstrated in the following points and authorities, these crucial errors deprived the defendants of a fair hearing. A rehearing is thus necessary in order to avoid opening the floodgates to spurious and unfounded civil rights claims in the future.

GROUNDS FOR REHEARING

I THE COURT OVERLOOKED MATERIAL LEGAL PRINCIPLES IN DETERMINING THE ADEQUACY OF THE CHILDREN'S EQUAL PROTECTION CLAIMS

As noted by the court, the equal protection challenge asserted on behalf of the children focuses not on the shooting incident itself, but rather, on the possibility that similar race-based incidents will occur in the future. This assertion is premised on

their allegation that officers MEJIA and SMITH exhibit a propensity to employ excessive force against black residents in the future, and that the City's supervisory officials sanction the encouragement of such a practice which threatens the security of all black people within the jurisdiction of the Fontana Police Department. Based thereon, the children seek injunctive relief against the officers and a declaratory judgment that the City's discriminatory policy is unconstitutional.

On Page 19 of its opinion, this court held that the above allegations are sufficient to assert a valid cause of action under the equal protection clause stating that:

> "The question of whether a litigant has a cause of action

> is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." (See, Footnote 14.)

The court reaches this conclusion without performing the required threshold legal analysis and cites no authority whatsoever in support of this position.

On the contrary those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article 3 of the Constitution, by alleging an actual case or controversy. Flast vs. Cohen 392 U.S. 83, 94 - 101, 20 L. Ed. 2d 947, 88 S.C. 1942 (1968). In order to do so, a plaintiff must demonstrate a personal stake in the outcome in order to assure that concrete adverseness

which sharpens the presentation of issues necessary for the proper resolution of constitutional questions. Baker vs. Carr, 369 U.S. 186, 204, 7 L. Ed. 2d 663, 82 S.C. 691 (1962). Mere allegations of an abstract injury are insufficient. The plaintiff must show that he either has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct and the injury or threat of injury must be both real and immediate not conjectural or hypothetical. Golden vs. Zwickler, 394 U.S. 103, 19 - 110, 22 L. Ed. 2d 113, 89 S.C. 956.

Thus, contrary to the court's opinion, the question or whether a valid cause of action has been stated is not separate from, but is instead integral

to, the question of whether, if the facts alleged in the complaint are proved, the children would necessarily be entitled to injunctive or declaratory relief.

In, O'Shea vs. Littleton, 414 U.S. 488, 38 L. Ed. 2d 674, 94 S.C. 669 (1974), the United States Supreme Court dealt with a case brought by a class of plaintiffs claiming that they had been subjected to discriminatory enforcement of the criminal law. Specifically, they alleged that a county magistrate and a judge habitually engaged in discriminatory conduct such as sentencing members of plaintiff's class more harshly than other defendants. The court dismissed these claims for failure of th complaint to allege a case or controversy. Id. at 493. In so doing,

the court noted that although it was claimed that particular members of plaintiff's class had actually suffered from the alleged unconstitutional practices, past exposure to illegal conduct does not in and of itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing present adverse effects.

It was further observed that the "case or controversy" considerations obviously shade into those determining whether the complaint states a sound basis for equitable relief. Id. at 499. (Emphasis supplied.)

The Supreme Court reached the same conclusion in Golden vs. Zwickler, 394 U.S. 103, 22 L. Ed. 2d 113, 89 S.C. 956 (1969). Therein, Zwickler sought a declaratory judgment that a New York

statute prohibiting anonymous handbills directly pertaining to election campaigns was unconstitutional. Although Zwickler had once been convicted under the statute, his sole concern related to a congressman who had left the House of Representatives for a place on the Supreme Court of New York and who would not likely be a candidate again. A unanimous court held that because it was most unlikely that Zwickler would again be subject to the statute, no case or controversy of sufficient immediacy and reality was present to allow a declaratory judgment. Id. at 109.

Moreover, in those cases involving allegations of police misconduct, the court has reached the same result. In Ashcroft vs. Mattis,

431 U.S. 171, 52 L. Ed. 2d 219, 97 S.C. 1739 (1977), the father of a boy who had been killed by the police sought damages and a declaration that the Missouri statute which authorized police officers to use deadly force in apprehending a person who committed a felony was unconstitutional. The plaintiff alleged that he had another son who "if ever arrested or brought under an attempt at arrest on suspicion of a felony, might flee or give the appearance of fleeing and would therefore be in danger of being killed by these defendants or other police officers . . ." Id. at 172. The court ruled that such speculation is insufficient to establish the existence of a present live controversy.

Indeed, directly on point is Rizzo vs. Goode, 423 U.S. 362, 46 L. Ed.

2d 561, 96 S.C. 598 (1976), a case in which the plaintiffs allege widespread illegal and unconstitutional police conduct aimed at minority citizens and against city residents in general. In finding these allegations insufficient, the court reiterated its holding in O'Shea that past wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy. It was further noted that the claim of injury rested upon "what one or a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of departmental procedures." Id. at 372. The court also held that plaintiff's showing at trial of a relatively few instances of violations by individual

police officers, without any showing of a deliberate policy on behalf of the named defendants, did not provide a basis for equitable relief.

In the instant case, of course, plaintiffs do not even allege there have been other wrongful shootings, and merely allege a "propensity" on the part of the involved officers.

In fact, even had the minor plaintiffs alleged similar instances of unconstitutional conduct, those allegations would be insufficient upon which to predicate their equal protection claims. In City of Los Angeles vs. Lyons, 461 U.S. 95, 75 L. Ed. 2d 675, 103 S.C. 1660 (1983), plaintiff sought a preliminary and permanent injunction against the City barring the use of allegedly

unconstitutional bar arm control holds. The plaintiff's first amended complaint alleged that ten chokehold related deaths had occurred. The Supreme Court dismissed these claims holding that no extension of O'Shea and Rizzo was necessary to hold that respondent Lyons had failed to demonstrate a case or controversy that would justify the equitable relief sought.

During the course of its opinion, the Lyons court engaged in a lengthy analysis of the case or controversy requirements under Article 3 of the Constitution. In this connection, it was noted that Lyons, standing to seek the injunction requested depended on whether he was likely to suffer future injury from the use of the chokehold by police officers.

Further, while Lyons may have been illegally choked on one previous occasion, thus giving him standing to claim damages against the individual officers and perhaps the City, that fact alone did nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officer who would illegally choke him into unconsciousness without any provocation or resistance on his part. Id. at 105.

The majority in Lyons supra, went on to state that in order to establish an actual controversy in that case, plaintiff would have had not only to allege that he would have had another encounter with the police, but also, would have had to make the incredible

assertion either (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or, (2) that the City ordered or authorized police officers to act in such manner.

Further, even assuming that Lyons would again be stopped for a traffic or other violation in the reasonably near future, it was untenable to assert that strangleholds are applied by the Los Angeles Police to every citizen who is stopped or arrested, regardless of the conduct of the person stopped. The court could not agree that the odds of both contingencies occurring were sufficient to make out a federal case for equitable relief. Id. at 108.

Thus, Lyons was no more entitled to an injunction than any other citizen of Los Angeles and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional. Id. at 111 (citing, Warth vs. Seldin, 422 U.S. 490, 45 L. Ed. 2d 343, 93 S.C. 2197 [1975]).

Finally, as noted above, plaintiff's equal protection claims do not involve the allegation that similar shooting incidents had occurred in the past. A single isolated incident of the use of excessive force by a police officer is insufficient to establish an official policy or practice of a municipality as required by the decision in Monell vs. New York City Department

of Social Services, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S.C. 2018; City of Oklahoma City vs. Tuttle, 471 U.S. ___, 85 L. Ed. 2d 791, 105 S.C. ___ (1985).

Petitioners respectfully submit that it was incumbent upon the court to perform the above legal analysis when construing the children's equal protection claims, and accordingly to have dismissed the claims as insufficient to state a cause of action.

II THE COURT'S RULING WITH RESPECT TO THE SUBSTANTIVE DUE PROCESS CLAIMS OF THE CHILDREN IS OVERLY BROAD AND UNWARRANTED

At Page 17 of its opinion, the court holds that the children's allegations that they were wrongfully deprived of support or loss of society and companionship of a parent states a

valid cause of action for deprivation of their substantive due process rights. This holding is apparently not limited to those instances in which the alleged unconstitutional conduct itself resulted in the death of the parent decedent. As such, the ruling is overly broad and will serve to open the floodgates to a multitude of civil rights claims brought by claimants whose family members have sustained nothing more than minor transitory injuries (either physical or psychological) as a result of the alleged unconstitutional conduct, thus depriving them, albeit temporarily, of the companionship and society thereof. If not properly limited, this ruling will have the effect of encouraging spurious claims and endless litigation by numerous claimants as a result of but

one allegedly unconstitutional occurrence.

At the outset, the opinion points out that the Supreme Court has not yet addressed the question of whether and when the government's act of taking the life of one family member deprives other family members of a cognizable liberty interest in the continued association with the decedent. Defendants acknowledge this to be the state of the law and believe that the issue is ripe for consideration. Nonetheless, the opinion cites several 9th Circuit cases holding that a parent may challenge under Section 1983 a states severance of a parent-child relationship as interfering with their substantive liberty interests in the companionship and society of their

children. Morrison vs. Jones, 607 F. 2d 1269 (9th Circ. 1979); Kelson vs. City of Springfield, 767 F. 2d 651 (9th Circ. 1985); Strandberg vs. City of Helena, 791 F. 2d 744 (9th Circ. 1986). The court further acknowledges that in those cases involving the parent-child, as opposed to the child-parent relationships, a custodial, as well as a companionship interest is usually at stake, but finds that this distinction does not justify constitutional protection for one but not the other. (Opinion, Page 15.) The distinction the court fails to make, however, is that in each of the cases relied upon wherein the alleged unconstitutional conduct resulted in something less than the death of the close family member, the alleged deprivation was either that of

denial of substantive due process rights, or one that implicated the custodial interests of the parents. Morrison vs. Jones, 607 F. 2d 1269 (9th Circ. 1979), supra; Kelson vs. City of Springfield. 767 F. 2d 651 (9th Circ. 1985); Santosky vs. Kramer, 455 U.S. 745 (1982); Lassiter vs. Department of Social Services, 452 U.S. 18 (1981); Pierce vs. Societv of Sisters, 268 U.S. 510 (1925).

Indeed, Strandberg vs. City of Helena, 791 F. 2d 744 (9th Circ. 1986), is the lone 9th Circuit case relied upon for the proposition that a parent may bring an action for violation of substantive due process rights based upon the deprivation of companionship and society of their son when no custodial interest was implicated.

However, that case also involved an instance in which the alleged unconstitutional conduct resulted in the death of the child. Petitioners recognize that in terms of precedential value the instant opinion is limited to the facts of the case. However, they express grave concern that the opinion is overly broad and contains unwarranted dictum, the net result of which will be a deluge of spurious and unfounded civil rights actions.

III CONCLUSION

For the reasons stated herein, petitioners CITY OF FONTANA, et al. respectfully request that a rehearing en

banc be granted pursuant to Rules 35 and 40 and that the order be modified as addressed herein.

Respectfully submitted,

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Attorneys for Petitioners &
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APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SONJA RENEE SMITH, as Administratrix of the Estate of RUFUS A. SMITH, SR., Deceased, as Guardian Ad Litem for the minor children of the Deceased, and individually; and MARCUS SMITH, a minor; NETRA SMITH, a minor; ANTHONY SMITH, a minor; JARREN SMITH, a minor; SHERRI SMITH, a minor; ARKILLIUS SMITH, a minor; and TASHIEKA SMITH, a minor, RUFUS ANTHONY SMITH, JR., individually,	)
Plaintiffs-Appellants,	)
v.	)
THE CITY OF FONTANA, a municipal corporation; ROBERT MEJIA; LARRY SMITH; NATHAN A. SIMON; CHARLES A. KOEHLER; BEN	)

ABERNATHY; BILL FREEMAN; DONALD)
F. DAY, WILLIAM FRAGNESS; JACK)
RATELLE; JOHN M. RAGER; and)
KATHY WILSON,)
)
Defendants-Appellees.)
)

FILED

January 6, 1987

Cathy A. Catterson, Clerk
U.S. Court of Appeals

No. 82-5896

D.C. No. CV 82-3262-WPG

O P I N I O N

Appeal from the United States
District Court for the Central
District of California
William P. Gray, District Judge,
Presiding
Submitted July 7, 1983*
Pasadena, California
Resubmitted May 27, 1986

*The panel unanimously finds this case appropriate for submission and disposition without oral argument pursuant to Ninth Circuit Rule 3(f) and Fed.R.App. 34(a).

Before: TANG**, ALARCON and NORRIS,
Circuit Judges

NORRIS, Circuit Judge:

**Judge Tang was selected to sit on this panel following the death of the Honorable William G. East, Senior United States District Judge for the District of Oregon, originally sitting by designation.

Plaintiffs filed this civil rights action under 42 U.S.C. § 1983 (1982) and other provisions of the Civil Rights Act The district court dismissed their complaint for failure to state a claim on the ground that relief under section 1983 was barred Parratt v. Tavlor, 451 U.S. 527 (1981), and Rutledge v. Arizona Bd of Regents, 660 F.2d 1345 (9th Cir. 1981), aff'd on other grounds sub nom. Kush v. Rutledge, 460 U.S. 719 (1983). We reverse on the basis of recent Supreme Court and Ninth Circuit authority holding that Parratt and its progeny are inapplicable civil rights actions

asserting substantive as opposed to purely procedural due process violations.[1]

I

FACTS AND PROCEDURAL HISTORY

According to the plaintiffs' complaint, City of Fontana police officers Robert Mejia and Larry Smith responded to a call concerning a domestic quarrel at the apartment of Rufus A. Smith, Sr. on May 27, 1982.

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[1]We temporarily vacated submission of the plaintiffs' appeal in order to await the decision of the Supreme Court in Daniels v. Williams, 106 S. Ct. 662 (19861, and the decisions of an en banc panel of this court in Piatt v. MacDougall, 773 F.2d 1032 (9th Cir. 1985) (en banc), Bretz v. Kelman, 773 F.2d 1026 (9th Cir. 1985) (en banc), and Haygood v. Younger, 769 F.2d 1350 (9th Cir. 1985) (en banc), cert. denied sub nom. Cranke v. Haygood, 106 S.Ct. 3333 (1986).

Encountering Mr. Smith in his parking lot, the officers asked him to place his hands on his head and detain him in order to discuss the alleged incident. As Mr. Smith attempted to comply, Officer Smith without provocation clenched him from behind in a chokehold and began to drag him backwards. While Mr. Smith was thus being held, Officer Mejia without provocation began to knee him in the groin and strike him in the face. Though Mr. Smith was unarmed and offered only instinctive resistance against the blows to his groin and face, Officer Smith drew his duty revolver and shot Mr. Smith in the back. Mr. Smith died approximately one and a half hours later during emergency surgery. Mr. Smith was a black man.

Plaintiffs brought suit in federal district court under 42 U.S.C. §1983[2] against officers Mejia and Smith, the City of Fontana, and various city officials[3], claiming that the

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2/ 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen o the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3/ These city officials include the Mayor, Mayor Pro-Tem, Chief of Police, City Manager, City Attorney, City Personnel Director, and members of the City Council. The complaint alleges that they all are responsible either for developing and enforcing adequate standards for the hiring, training, and supervising of police officers or for rendering legal advice to other officials charged with such supervision.

defendants' conduct violated the First, Fourth, Fifth, and Eighth Amendments and both the due process and equal protection clauses of the Fourteenth Amendment. Plaintiff Sonja Smith, suing in her capacity as administratrix of the decedent's estate, seeks to vindicate Mr. Smith's personal civil rights. She and the other plaintiffs also sue in their capacities as adult or minor children of Mr. Smith, seeking to vindicate their own personal rights.

Relying on the then recently-decided Parratt v. Taylor and Rutledge v. Arizona Bd. of Regents, the district court dismissed the action in its entirety for failure to state a claim on the ground that California's post-deprivation remedies for violations of state tort law were

adequate to protect the plaintiffs from suffering any cognizable constitutional injury.[4/]

II

LIMITATIONS ON PARRATT AND ITS PROGENY

In Parratt v. Taylor, the Supreme Court held that when a state actor negligently deprived a prisoner of a minor property interest through a "random and unauthorized" act, the state's provision of an adequate

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4/The plaintiffs also asserted claims for relief under 42 U.S.C. §§ 1981, 1985(2) and 1985(3) and joined several pendent state claims. The district court treated separately the section 1985 claims, holding that based on the facts alleged in the complaint the plaintiffs "cannot state a cause of action with respect to conspiracy." The plaintiffs apparently do not appeal this part of the district court's ruling, and hence we do not review it. The district court dismissed the pendent state claims as well.

post-deprivation remedy satisfied the constitutional requisite of procedural due process. 451 U.S. at 541-44. The district court apparently understood Parratt to preclude any section 1983 action based on an official's "random and unauthorized" deprivation of a constitutional right when a state provides adequate post-deprivation remedies. However, Parratt and its progeny merely determine when a state's post deprivation remedies are adequate to protect a victim's procedural due process rights. The Parratt line of cases does not focus on the relevance of procedural protections to alleged violations of substantive constitutional rights. As Justice Blackmun noted in his concurrence in Parratt "there are certain governmental actions that, even

if undertaken with a full panoply of procedural protection, are, in and of themselves, antithetical to fundamenta notions of due process." 451 U.S. at 545. Such actions violate the substantive protections of the Constitution and lie outside the scope of Parratt because the constitutional violation is complete at the moment the action or deprivation occurs, rather than at the time the state fails to provide requisite procedural safeguards surrounding the action. Hence, Parratt is inapplicable to alleged violations of one of the substantive provisions of the Bill of Rights, such as the Fourth Amendment. See Robins v. Harum, 773 F.2d 1004, 1009 (9th Cir. 1985) (Parratt's focus on post-deprivation remedies simply "is not applicable to a

claim, such as the instant excessive use of force claim, brought under the Fourth Amendment"); see also Daniels v. Williams, 106 S. Ct 662, 678 (1986) (separate opinion of Stevens, J., concurring in the judgment) ("[W]hen the Fourth Amendment is violated . . . the provision of an independent federal remedy under section 1983 is necessary to satisfy the purpose of the statute.").

In addition, though the Fourteenth Amendment speaks in terms of "due process," the Supreme Court has consistently maintained that the due process clause "contains a substantive component, sometimes referred to as 'substantive due process,' which bars certain arbitrary government actions 'regardless of th fairness of the

procedures used to implement them.'" Daniels , 106 S. Ct. at 678 (Stevens, J., concurring) (citation omitted). We have therefore repeatedly concluded that "[b]ecause the substantive due process is violated at the moment the harm occurs the existence of a post-deprivation state remedy should not have any bearing on whether a cause of action exists under § 1983." Rutherford v. City of Berkeley, 780 F.2d 1444, 1447 (9th Cir. 1986). See Shah v. County of Los Angeles. 797 F.2d 743, 746 (9tb Cir. 1986); McRorie v. Shimoda, 795 F.2d 780, 785-86 (9th Cir. 1986) Gaut v. Sunn, 792 F.2d 874, 876 (9th Cir. 1986); Mann v. Citv of Tucson. 782 F.2d 790, 792-93 (9th Cir. 1986).

Dismissal of the plaintiffs' section 1983 claims was therefore improper to the extent that the complaint stated valid claims for relief for violations of substantive rather than procedural constitutional rights.[5/] We address each of the constitutional claims asserted by each of the plaintiffs in turn, reviewing the claims de novo. Guillory v. County of Orange,

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5/ Liability under section 1983 lies where (1) "the conduct complained of was committed by a person acting under color of state law; and (2) . . . this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." Parratt, 451 U.S. at 535. There is no dispute here that the alleged conduct by officers Mejia and Smith satisfies the "under color of state law" requirement, as they "were clothed with the legitimacy of the government and were purporting to act thereunder." Haygood, 769 F.2d at 1354. We thus focus solely on whether the plaintiffs have been deprived of any constitutional rights.

731 F.2d 1379, 1381 (9th Cir. 1984). In conducting this review we presume that the facts alleged in the complaint are true and construe them in the light most favorable to the appellant. North Star Intern. v. Arizona Corp. Comm'n, 720 F.2d 578, 580 (9th Cir. 1983). Dismissal is improper "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief'" Franklin v. Oregon, 662 F.2d 1337, 1343 (9th Cir. 1981) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

III

FOURTH AMENDMENT CLAIMS

The estate's first legal theory is that the officers' actions and the

City's policies violated Mr. Smith's Fourth Amendment rights. In Tennessee v. Garner, the Supreme Court held that "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."[6/] 471 U.S. 1, 7 (1985). Where a victim of a seizure alleges that officers unreasonably employed excessive force under the circumstances in order to detain or subdue her, the "reasonableness of force should be analyzed in light of such factors as the requirements for the officers' safety, the motivation for the arrest [or

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6/The Fourth Amendment, made applicable to the states through the Fourteenth Amendment in Wolf v. Colorado, 338 U.S. 25 (1949), states in part that the "right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

detention], and the extent of the injury inflicted." McKenzie v. Lamb. 738 F.2d 1005, 1011 (9th Cir. 1984). Hence, an allegation that force used during a personal seizure was excessive as measured by these factors state a claim for relief under section 1983 predicated upon the Fourth Amendment. See Garner 471 U.S. at 9 (use of deadly force to prevent escape constitutes an unreasonable seizure unless the officer has probable cause to believe that the suspect poses a threat of serious harm to the officer or others); Robins, 773 F.2d at 1008-10 (allegation that police used excessive force while transporting plaintiffs to police station after arrest states a section 1983 claim for a Fourth Amendment violation); MacDonald v. Musick, 425 F.2d 373, 377 (9th Cir.)

(defendant asserting that his arrest was unlawful, that he had a right to resist, and that he sustained injuries as a result of his resistance stated claim under section 1983), cert. denied, 400 U.S. 852 (1970); see also Gilmere v. City of Atlanta, 774 F.2d 1495, 1502 (11th Cir. 1985) (alleged beating and killing of suspect during process of detention stated a section 1983 claim for Fourth Amendment violation), cert. denied, 106 S. Ct. 1970 (1986). The defendants candidly concede that under this case law the complaint's allegations that the decedent was "unarmed and helpless, and in way posed a threat to the safety [of the officers or] any other persons," Complaint at ¶ 30, and that the defendants' acts were "unwarranted, cruel, inhuman,

unjustifiable, and excessive," id. at ¶ 33, are sufficient to state a claim under the Fourth Amendment. See Appellees' Supplemental Brief, at 2.

The estate can assert this claim on Mr. Smith's behalf. Under section 1988, a section 1983 claim that accrued before death survives the decedent when state law authorizes a survival actio as a "suitable remed[y] . . . not inconsistent with the Constitution and laws of the United States . . . ." 42 U.S.C. § 1988 (1982). See Robertson v. Wegmann. 436 U.S. 584, 588-90 (1978). Under California's survival statute, "no cause of action is lost by reason of the death of any person but may be maintained by . . . his . . . administrator." Cal. Prob.

Code §573 (West Supp. 1986).[7] Therefore, Mr. Smith's Fourth Amendment claim survives his death and can be maintained by plaintiff Sonja Smith in her capacity as administrator of his estate.[8]

7/As an exception to this rule, survival actions may not be brought in California if the decedent's death is instantaneous with her legal injury, see Pease v. Beech Aircraft, 38 Cal. App. 3d 450, 459-60, 113 Cal. Rptr. 416, 422-23 (1974), but the complaint here alleges that Mr. Smith died approximately one and one-half hours after he was shot.

8/We express no view here as to whether the remedies authorized by California's survival statute, pecuniary and punitive damages but not damages for pain and suffering, are too limited to be "consistent" with the Civil Rights Act's statutory scheme and whether federal law, therefore, provides an independent source of recovery for a broader array of damages. see generally Robertson, 436 U.S. at 594 (explicitly holding question open); Guyton v. Phillips, 532 F.Supp. 1154, 1165-67 (N.D.Cal. 1981) (interpreting federal law as allowing estate to recover compensation for

(continued...)

Mr. Smith's children, suing in their individual capacities, also assert a claim for relief under the Fourth Amendment. However, the Supreme Court has held that "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." Alderman v. United States, 394 U.S. 165, 174 (1969). The children were not directly subjected to the excessive use of state force and

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8/(...continued)
decedent's pain and suffering and for his loss of life itself even though such compensation is unavailable under California's survival statute); Bass by Lewis v. Wallenstein, 769 F.2d 1173, 1187-90 (7th Cir. 1985) (holding Illinois' limited recovery under survival and wrongful death statutes inconsistent with federal law and authorizing awards of damages beyond those expressly provided); Bell v. City of Milwaukee, 746 F.2d 1205, 1235-41, 1250-53 (7th Cir. 1984) (same conclusion with respect to Wisconsin law).

therefore cannot maintain personal causes of action under section 1983 in reliance on this Fourth Amendment theory.

IV

SUBSTANTIVE DUE PROCESS CLAIMS

A. The Estate's Substantive Due Process Claim

The estate asserts a section 1983 claim under the due process clause of the Fourteenth Amendment. The district court erred in construing this claim as alleging only a procedural due process violation because egregious government conduct in the form of excessive and brutal use of physical force constitutes a violation of substantive due process. See Rutherford, 780 F.2d 1446 (allegation of unprovoked assault and battery by police

officers states a claim for violation of substantive due process); see also Shah, 797 F.2d at 746 ("'intentional unjustified, [and] unprovoked' assault by a prison guard on a prisoner may be a violation of substantive due process") (citation omitted); McRorie, 795 F.2d at 785 (allegation of intentional prison guard brutality states cause of action for substantive due process violation); Gaut, 792 F.2d at 875 (prison beatings which "shock the conscience" are actionable as substantive due process violations); Meredith v. Arizona, 523 F.2d 481, 482-84 (9th Cir. 1975) (assault and battery by prison guard violates the right to liberty). As with the Fourth Amendment claim, resolving a substantive due process claim requires courts to balance several factors

focusing on the reasonableness of the officers' actions given the circumstances. In Rutherford, we held that

> "in determining whether the constitutional line has be crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm."

780 F.2d at 1446 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)). Given its focus on these factors, the complaint clearly alleges that Mr. Smith's substantive due process rights were violated and hence the estate pleads a valid due process claim

under section 1983.

B. The Children's Personal Substantive Due Process Claim

The children also plead that the defendants violated their personal "rights not to be deprived of the life of their father and not to be deprived of his love, comfort, and support. . . ." Complaint, at ¶ 40. We conclude that based on this allegation the children state a claim for violation of their substantive due process rights.

The Supreme Court has yet to address whether and when the government's act of taking the life of one family member deprives other family members of a cognizable liberty interest in continued association with the decedent. Our court, however, has held that parents can challenge under section

1983 a state's severance of a parent-child relationship as interfering with their substantive liberty interests in the companionship and society of their children. In Morrison v. Jones, 607 F.2d 1269 (9th Cir. 1979), cert. denied, 445 U.S. 962 (1980), we held that when county officials removed a mentally ill boy from his mother's custody on the ground that she could not adequately care for him, the mother could bring a section 1983 action for damages to vindicate her "substantive familial rights that have long been considered the 'basic civil rights of man.'" Id. at 1276 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)). More recently, in Kelson v. City of Springfield, 767 F.2d 651 (9th Cir. 1985), we held that parents who alleged

that school officials negligently allowed their son to commit suicide could maintain a section 1983 action to vindicate "their fundamental parental rights guaranteed by the Ninth Amendment . . . and . . . their right to association with their son guaranteed by the First Amendment." Id. at 653. After examining a long line of Supreme Court cases stressing "the importance of familial bonds" and identifying the many times the Supreme Court has applied both substantive and procedural due process to protect the interests of parents "in maintaining a relationship With their children," id. at 654, We concluded that "a parent has a constitutionally protected liberty interest in the companionship and society of his or her child." Id. at 655.

We now hold that this constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents. The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal, and we see no reason to accord less constitutional value to the child-parent relationship than we accord to the parent-child relationship.[9] Cf. Roberts v. United States Jaycees, 468 U.S. 609, 619-20 (1984) ("Family

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[9] Indeed, if any distinction can be drawn, one might even argue that a child has a greater interest in the continued life of a biological parent than vice versa because often the father has or can have other biological children, whereas a child can never replace a biological parent.

relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.").

We recognize that the Supreme Court cases on which Morrison and Kelson relied to define the substantive liberty interest in a parent-child relationship involved suits by parents of minor children. The state's interference with the parent-child relationship therefore threatened not only the parents' interest in the companionship of their children, but also the parents' constitutionally-protected interest in raising their children. See, e.g., Santosky v. Kramer, 455 U.S. 745 (1982)

(natural parents entitled to procedural due process at a state-initiated parental rights termination proceeding); Lassiter v. Dep't of Social Services, 452 U.S. 18 (1981) (parents entitled to procedural due process prior to state termination of parental status on grounds of unfitness); see also Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (requirement that children attend public school unreasonably interferes with parents' liberty "to direct the upbringing and education of children under their control").

When, as in this case, a child claims constitutional protection for her relationship with a parent, there is no custodial interest implicated, but only a companionship interest. This distinction between the parent-child and

the child-parent relationships does not, however, justify constitutional protection for one but not the other. We hold that a child's liberty interest in the companionship and support of a parent is sufficiently weighty by itself that interference with this interest may trigger a violation of substantive due process. Our view finds support in Strandberg v. City of Helena, 791 F.2d 744 (9th Cir. 1986), where parents brought a section 1983 claim against the state for negligently allowing their son to commit suicide in jail. The parents' interest in directing the upbringing of their son was not implicated because the son was twenty-two years old and no longer a minor; the parents therefore "had not been deprived of any constitutional right to parent." Id. at

748 n.1 (emphasis added). However, the parents were able to "claim a violation of their fourteenth amendment due process rights in the companionship and society of the decedent. Id. at 748. Thus, the familial relationship, and not the more narrow custodial interest of the parents, gave rise to the substantive due process action. See also Bell, 746 F.2d at 1245 (parent can assert personal substantive due process claim for death of adult child because the "Supreme Court's decisions protect more than the custody dimension of the parent-child relationship"); cf. Moore v. City of East Cleveland, 431 U.S. 494 (1977) (extending Supreme Court principles protecting the parental role in raising children to protect a broader set of relationships within the family

structure and invalidating under substantive due process a zoning ordinance preventing grandmother and grandson from living together in certain circumstances).[10/]

Our conclusion also finds compelling support in the legislative history of section 1983's precursor, the Ku Klux Klan Act of 1871. Representative Butler described the Act "as a remedy for wrongs, arsons, and murders done. This is what we offer to man whose house

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10/We intimate no view as to whether the familial relationship between siblings is sufficiently constitutionally protected as to allow one sibling to assert a section 1983 action based on the death of the other. Compare Trujillo v. County Commissioners, 768 F.2d 1186 (10th Cir. 1985) (siblings can bring section 1983 claims for substantive due process violations resulting from wrongful death), with Bell, 746 F.2d 1205 (siblings cannot do so).

has been burned, as a remedy; to the woman whose husband has been murdered, as a remedy; to the children whose father has been killed, as a remedy." Cong. Globe, 42d Cong., 1st. Sess. 807 (1871) (emphasis added). Indeed, the "legislative history makes a clearer case for recovery to the child due to loss of support or loss of society and companionship of a parent . . . [than for) the parent's rights [for recovery] vis-a-vis the loss of a child. Bell, 746 F.2d at 1244 (emphasis added). Both case law and legislative history thus lead us to the conclusion that Mr. Smith's adult and minor children all state valid section 1983 claims for violations of their personal

substantive due process rights under the Fourteenth Amendment.[11/]

V

EQUAL PROTECTION CLAIMS

The complaint alleges that the City had an unwritten policy authorizing excessive force against blacks and that pursuant to that policy officers Smith and Mejia used excessive force to subdue decedent Mr. Smith because he was black. If these facts are proved, Mr. Smith was "personally denied equal treatment

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11/We recognize that at least one circuit has held that plaintiffs must allege an intentional interference with a parent-child relationship to state a claim under this substantive due process theory. See Trujillo, 768 F.2d at 1190. However, our circuit has not adopted such a state of mind requirement. See Kelson, 767 F.2d at 652 (substantive due process claim stated where state's interference with parent-child relationship result from negligence).

solely because of [his] membership in a disfavored group." Heckler v. Mathews, 465 U.S. 728, 740 (1984). Accordingly, the estate may maintain a survival action against all defendants for damages suffered by Mr. Smith as a result of the shooting incident.12/

12/We reach this conclusion subject to one important caveat: the complaint may be deficient with respect to its allegation that the City adopted an "official policy" giving rise to municipal liability under Monell v. Dep't of Social Services, 436 U.S. 658, 694 (1978). The unwritten "policy" averred in the complaint is the "failure of the defendants to provide training, instruction and supervision regarding the lawful use of an officer's service revolver and the use of excessive and deadly force" and the failure to enforce departmental regulations creating an "atmosphere of lawlessness." Complaint, at ¶¶ 49-50. Because the district court did not reach the issue and the parties did not brief it on appeal, we do not consider whether the facts alleged in the complaint, if proved, would establish municipal liability under Monell and its progeny. See generally City of Oklahoma City v. Tuttle, 471

(continued...)

The children also assert an equal protection challenge, focusing not on the shooting incident itself,[13] but

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[12] (...continued)
U.S. 808 (1985) (raising but not resolving the question whether a "policy" of inadequate police training meets the Monell standard). This issue is appropriately left for initial resolution by the district court upon remand. See Kelson, 767 F.2d at 656.

We also note that the individual City supervisory officials are liable only if the plaintiffs demonstrate an "affirmative link between the occurrence of the . . . police misconduct and the adoption of any policy or plan by . . . [the officials] -- express or otherwise -- showing their authorization or approval of such misconduct." Rizzo v. Goode, 423 U.S. 362, 371 (1976). Whether such a link exists here of course depends on whether anyone adopted a plan or policy cognizable under Monell, and hence this question is also appropriately left for the district court upon remand.

[13] We do not address the difficult question whether the children could state a claim for damages under the (continued...)

rather on the possibility that similar race-based incidents will occur in the future. Specifically, the children allege that the propensity of officers Mejia and Smith to employ excessive force against black residents in the future and the City's and supervisory officials' sanction and encouragement of such a practice by all City police officers threaten the physical security of all black people with the jurisdiction of the Fontana Police Department. Fearing future injury at the hands of the Fontana police because of their race, the children seek

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13/ (...continued)
equal protection clause based on the police shooting of their father. We do not interpret their complaint as pleading this claim, and they have not raised it in their briefs filed with this court.

injunctive relief against officers Mejia and Smith barring them from active street duty and seek a declaratory judgment that the City's discriminatory policy is unconstitutional. We agree with the children that the alleged individual propensities and institutional practice, if proved, would deny them the same protection against abuse by law enforcement officers that white residents enjoy. Therefore, the children assert a valid cause of action under the equal protection clause to challenge all defendants' ongoing practice of discriminating against black residents. Dismissal of this claim under Fed. R. Civ. P. 12(b)(6) was therefore improper.14/

14/We do not address the question whether, if the facts alleged

(continued...)

VI

REMAINING CONSTITUTIONAL CLAIMS

The plaintiffs also alleged violations of their First, Fifth, and Eighth Amendment rights. Because these rights are all substantive in nature, Parratt's focus on post-deprivation remedies is inapposite. However, these claims were all properly dismissed because the plaintiffs fail to state a claim for relief with respect to these rights. Except insofar as the First

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14/ (...continued)
in the complaint are proved, the children would necessarily be entitled to either injunctive or declaratory relief. See Davis v. Passman, 442 U.S. 228, 239 (1979) ("[T]he question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive.").

Amendment right to intimate association is relevant to the children's ability to assert a substantive due process claim, ante at ___, the complaint alleges no action of the officers or the city defendants that could conceivably implicate First Amendment concerns. The plaintiffs do not allege that the officers' action or the City's policy was designed to or had the effect of interfering with the decedent's or the children's ability to exercise their rights of free speech or association. Because the Fifth Amendment claim must rest either on that Amendment's due process clause or its implicit equal protection clause, any Fifth Amendment claim is merely duplicative of the Fourteenth Amendment claims. The Eighth Amendment protects only those who have

been convicted of a crime, see Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979), and therefore none of the plaintiffs can claim its protection here.[15]

VII

CONCLUSION

We hold that Mr. Smith's estate has properly stated a section 1983 claim for damages against all defendants for violations of his Fourth Amendment rights, against all defendants for

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[15] The district court did not treat separately the plaintiffs' claim that the defendants violated 42 U.S.C. § 1981 by denying them "the full and equal benefit of all laws and proceedings for the security of persons . . . as is enjoyed by white citizens . . . ." Because Parratt places limitations only on procedural due process actions under section 1983, Parratt does not justify dismissal of the section 1981 claim. Because the issue was not briefed on appeal, we do not address the question whether the plaintiffs state a cause of action under section 1981.

violations of his Fourteenth Amendment substantive due process rights, and against all defendants for violations of his Fourteenth Amendment equal protection rights. We also hold that Mr. Smith's children have stated a section 1983 claim for damage against all defendants for violations of their substantive due process rights and a cause of action for injunctive relief but not damages against all defendants for violations of their Fourteenth Amendment equal protection rights. The district court's dismissal of the plaintiffs' action is therefore reversed.

REVERSED AND REMANDED.

APPENDIX E

No. 82-5896

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SONJA RENEE SMITH, as Administratrix of the Estate of RUFUS A. SMITH, SR. Deceased, as Guardian ad litem for the Minor Children of the Deceased, and Individually; RUFUS ANTHONY SMITH, JR., Individually; and MARCUS SMITH, a Minor; NETRA SMITH, a Minor; ANTHONY SMITH, a Minor; JARREN SMITH, a Minor; SHERRI SMITH, a Minor; ARKILLIUS SMITH, a Minor; and TASHIEKA SMITH, a Minor,

Plaintiffs-Appellants,

vs.

THE CITY OF FONTANA, a Municipal Corporation, ROBERT MEJIA, LARRY SMITH, NATHAN A. SIMON, CHARLES A. KOEHLER, BEN ABERNATHY,

BILL FREEMAN, DONALD F. DAY, WILLIAM KRAGNESS, JACK RATELLE, JOHN M. RAGER, and KATHY WILSON,

Defendants-Appellees.

FILED MAY 27, 1986

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Appeal From the United States District Court
Central District of California
Honorable William P. Gray, Judge Presiding

APPELLEES' SUPPLEMENTAL BRIEF

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(CENTRAL CALIFORNIA-JUDGE GRAY)

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IN THE

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THE CITY OF FONTANA, etc., et al.,

Defendants-Appellees.

CERTIFICATION OF INTERESTED PARTIES AS REQUIRED BY NINTH CIRCUIT RULE 13(b)(3)

We, the undersigned, counsel of record for The City of Fontana, Robert Mejia, Larry Smith, Nathan A. Simon, Charles A. Koehler, Ben Abernathy, Bill Freeman,

Donald F. Day, William Kragness, Jack Ratelle, John M. Rager, and Kathy Wilson, hereby certify that there are no known interested parties other than those participating in this case.

We certify and declare the foregoing to be true and correct.

DATED: May 20, 1986, at Los Angeles, California.

COTKIN, COLLINS, KOLTS
& FRANSCELL

By: _____
BRADLEY C. WITHERS

By: _____
DAVID L. SHAIN

Attorneys for Defendants-
Appellees

No. 82-5896

IN THE

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SONJA RENEE SMITH, as Administratrix of the Estate of RUFUS A. SMITH, SR., Deceased, as Guardian ad litem for the Minor Children of the Deceased, and Individually; RUFUS ANTHONY SMITH, JR., Individually; and MARCUS SMITH, a Minor; NETRA SMITH, a Minor; ANTHONY SMITH, a Minor; JARREN SMITH, a Minor; SHERRI SMITH, a Minor; ARKILLIUS SMITH, a Minor; and TASHIEKA SMITH, a Minor,

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Defendants-Appellees.

APPELLEES' SUPPLEMENTAL BRIEF

STATEMENT OF LEGAL ISSUE

1. In what respect do the holdings in Daniels v. Williams, No. 84-5872 (U.S. January 21, 1986); Haygood v. Younger, 769 F.2d 1350 (9th Cir. 1985) (en banc); Piatt v. MacDougall, 773 F.2d 1032 (9th Cir. 1985) (en banc); and Bretz v. Kelman, 773 F.2d 1026 (9th Cir. 1985) (en banc) affect the appellants' claims under 42 U.S.C. §1983.

STATEMENT OF RELEVANT FACTS

Appellees incorporate by reference herein, the STATEMENT OF RELEVANT FACTS set forth in their Opening Brief, on file herein, as if fully set forth.

ARGUMENT

I

APPELLEES CONCEDE THAT APPELLANT STATES A VALID FOURTH AMENDMENT CLAIM

According to the clear dictates of Robins v. Harum, 773 F.2d 1004 (9th Cir. 1985), a Fourth Amendment claim under 42 U.S.C. § 1983 states a cause of action where police are alleged to have used excessive force in the course of an arrest.

Therefore, although not raised by appellants, appellees concede that the appeal should be allowed with respect to this issue. However, this cause of action should only be allowed as to appellant SONJA RENEE SMITH, as Administratrix of the Estate of RUFUS A. SMITH, SR. See IV, infra.

II

RECENT DECISIONS OF THIS CIRCUIT EXCEED SUPREME COURT GUIDELINES

Recent decisions of this Circuit have exceeded Supreme Court guidelines regarding Fourteenth Amendment Due Process causes of action, brought under 42 U.S.C § 1983.

In Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), the Supreme Court held that § 1983 liability may not be predicated upon a government deprivation arising from a negligent,"random and unauthorized act". Id. at 541. Where the questioned act does not occur as the "result of some established state procedure", meaningful state post-deprivation remedies will satisfy

due process requirements. Id. at 541. Parratt was recently overruled by Daniels only as to its conclusion "that mere lack of due care by a state official may 'deprive' an individual of life, liberty or property under the Fourteenth Amendment." Daniels v. Williams, No. 84-5872 (U.S. January 21, 1986). (Emphasis added.)

Thus, although mere negligence does not state a claim under the Fourteenth Amendment, it does not follow that allegations of intentional conduct will automatically suffice.

Hudson v. Palmer, 468 U.S. , 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) and other cases were cited by Daniels for the proposition that the guarantee of due process, historically, "has been applied to deliberate decisions of

government officials to deprive a person of life, liberty or property." In Hudson, an inmate plaintiff alleged a property deprivation after a "shakedown" search of his prison cell. In its decision, the Court found:

> "no logical distinction between negligent and intentional deprivations of property insofar as the 'practicability' of affording pre-deprivation process is concerned. The State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct. Arguably, intentional acts are even more difficult to anticipate because one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signalling his intent."

82 L.Ed.2d at 407.

The Hudson court found the Parratt decision to be limited to a

negligent deprivation of property; however, Parratt's logical underpinnings rendered it applicable to life and liberty denials as well. The conclusions of Parratt did not turn on the type and extent of deprivation. Rather, that case focused on the inability to provide a pre-deprivation hearing where a negligent, "random and unauthorized" act is concerned. The Hudson court expanded Parratt to include an intentional deprivation, since, in this context, there was no logical basis to draw a distinction among state of mind gradations. It is similarly illogical to limit the analysis to allegations of property deprivation.1/

1/In his concurring opinion in Daniels v. Williams, supra, Justice Stevens wrote: "'Deprivation', it seems to me, identifies not the actor's state of

(continued...)

In the case at bar, to the extent that police officers used excessive force in their contact with Rufus A. Smith, Jr., said force was unauthorized by the City of Fontana. Appellants have not alleged the existence of any statute, regulation or course of practice which authorized the use of excessive force.

Appellants argue that the randomness of an action is irrelevant where a deprivation of life is involved. By this reasoning, no due process herein could possibly be adequate, in that a

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1/(...continued)
mind, but the victim's infringement or loss." He added: "It is true that Parratt involved an injury to 'property' and that Daniels' case involved an injury to 'liberty', but, in both cases, the plaintiff claimed nothing more than a 'procedural due process' violation. In both cases, a pre-deprivation hearing was definitionally impossible."

life, once taken, can never be restored.

The irretrievability of a human life is indisputable. Yet, is must be said that a deprivation of liberty frequently creates a similar loss. See Haygood v. Younger, 769 F.2d 1350 (1985) (An inmate was imprisoned well beyond his actual release date. This time was lost and could never be recovered).

Appellants herein seek money damages, which are available under both federal and state causes of action. Unless appellants can allege that the City of Fontana pursued a course of conduct which sought to deprive persons of their civil rights, state wrongful death remedies will suffice.

Haygood eschewed a liberty - property dichotomy, holding that "the inquiry more appropriately focuses on

the gravity of the effect of government conduct on protected interests". Id. at 1356. Haygood set forth a "continuum" concept to reflect that determination, while affirming the validity of the Parratt "random and unauthorized" standard. Id. at 1357.

Other recent decisions of this Circuit have attempted to minimize the impact of Parratt and Hudson. In Piatt v. MacDougall, 773 F.2d 1032, 1036 (1985), this Circuit held that "(T)he considerations underlying Parratt are simply inapplicable to deliberate, considered, planned, or prescribed conduct by state officials, whether or not such conduct is authorized."

The holding in Parratt does not support this conclusion. Parratt drew a clear distinction between authorized and

unauthorized conduct. Further, Hudson reflected the Court's view that there is no rational basis for distinguishing between intentional and negligent conduct for constitutional purposes, where such conduct is "random and unauthorized". Piatt's conclusion that Hudson extended Parratt only to "relatively minor infractions involving random and unauthorized but intentional conduct by state officials" is likewise unwarranted. Piatt v. MacDougall, supra at 1036. The Supreme Court has not adopted the "continuum" concept advocated by Haygood v. Younger, supra. The reasoning enunciated in Parratt and Hudson is equally applicable to alleged intentional deprivations of life, liberty or property.

Dicta in Bretz v. Kelman, 773 F.2d 1026, 1030 (1985) that the state has an opportunity to provide a post-deprivation remedy only where the deprivation is of a "relatively insignificant interest" is likewise not supportable.

In Haygood, the Court found that "Parratt and Hudson dealt with relatively minor infractions of prisoners' interest in their personal property and did not deal with official assaults, batteries or other invasions of personal liberty." Haygood v. Younger, supra at 1356. To the contrary, the underlying bases for the Parratt decision suggest that its applicability extends to all such factual contexts.

III

NO EIGHTH AMENDMENT DEPRIVATION IS PROPERLY ASSERTED

Appellants' reliance on Haygood v. Younger, supra, in support of an alleged Eighth Amendment violation is misplaced. The Eighth Amendment prohibits the imposition of "cruel and unusual punishment" after the conviction of a crime. Bell v. Wolfish, 441 U.S. 520, 535 Note 16, 99 S.Ct. 1861, 1871, 60 L.Ed.2d 447 (1979) [emphasis added]. The appellants herein allege a civil rights deprivation during the course of an investigative detention. Obviously, neither trial nor conviction ensued. The Bell Court, quoting Ingraham v.

Wright, 430 U.S. 651, 671-72, Note 40, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), wrote:

> "...[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment." Bell v. Wolfish supra.

In Bell, prisoners in pre-trial detention brought suit to challenge various institutional procedures and practices. The Court determined that the Eighth Amendment was inapplicable to individuals who had not been convicted. A fortiori, the same results should apply, when, according to appellants'

brief, appellant had not even been arrested at the time of his encounter with police officers.

Case law cited by appellants is inapposite. In each of the indicated cases, the litigant asserted an Eighth Amendment cause of action arising from a post-conviction punishment.

In Haygood v. Younger, supra, the appellant's "cruel and unusual punishment" was detention substantially beyond the expiration of his prison term.

In Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), the Court concluded that the Eighth Amendment barred disproportionate sentences, i.e., conviction for "uttering" a "no account" check did not justify a life sentence.

In Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), the Court determined that a convicted prisoner's Eighth Amendment rights were violated by the deliberate indifference to his serious medical needs exhibited by prison personnel.

In Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958), appellant's application for a passport had been denied on the grounds that he had been stripped of his citizenship after a court-martial conviction for wartime desertion. The Court determined that denaturalization as a punishment was barred by the Eighth Amendment.

The Eighth Amendment is directed to and proscribes only "cruel and unusual punishment" after a criminal

conviction. It has no applicability herein.

IV

AN ACTION UNDER THE CIVIL RIGHTS ACT IS PERSONAL IN NATURE

The right to bring an action under the Civil Rights Act is personal to the allegedly deprived party and does not accrue to an heir or relative thereof. Dohaish v. Tooley, 670 F.2d 934 (10th Cir. 1982); cert denied, 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982); but see Kelson v. City of Springfield, 767 F.2d 651 (9th Cir. 1985), which declined to follow Dohaish and other cases.

A deprivation of constitutional rights is inherently personal. It is the deceased appellant, Rufus A. Smith,

Sr., if anyone, who allegedly sustained a deprivation herein. Mr. Smith's relatives and heirs may have associated causes of action to assert which flow from the alleged deprivation. If so, said actions can be maintained under California state law. However, all constitutional claims must be litigated, if at all, only on behalf of the Estate of Rufus A. Smith, Sr.

V

CONCLUSION

For all reasons stated, the judgment of the District Court in this action should be affirmed.

DATED: May 20, 1986

Respectfully submitted,

COTKIN, COLLINS, KOLTS
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BY: _____
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BY: _____
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Attorneys for Defendants-
Appellees

No. 82-5896

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SONJA RENEE SMITH, etc., et al.,

Plaintiffs-Appellants,

vs.

THE CITY OF FONTANA, etc., et al.,

Defendants-Appellees.

STATEMENT OF RELATED CASES AS REQUIRED BY NINTH CIRCUIT RULE 13(b) (4)

We, the undersigned, counsel of record for The City of Fontana, Robert Mejia, Larry Smith, Nathan A. Simon, Charles A. Koehler, Ben Abernathy, Bill Freeman, Donald F. Day, William Kragness, Jack

Ratelle, John M. Rager, and Kathy Wilson, hereby state that other than the cases stated within this brief, there are no other known cases in this Court that are deemed related.

DATED: May 20, 1986, at Los Angeles, California.

COTKIN, COLLINS, KOLTS
& FRANSCELL

By: _____
BRADLEY C. WITHERS

By: _____
DAVID L. SHAIN

Attorneys for Defendants-
Appellees

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SONJA RENEE SMITH, as Administratrix of the Estate of RUFUS A. SMITH, SR., Deceased, as Guardian Ad Litem for the Minor Children of the Deceased, and Individually; RUFUS A. SMITH, JR., Individually; MARCUS SMITH, a Minor; NETRA SMITH, a Minor; ANTHONY SMITH, a Minor; JARREN SMITH, a Minor; SHERRI SMITH, a Minor; ARKILLIUS SMITH, a Minor; and TASHIEKA SMITH, a Minor,	)
Plaintiffs-Appellants,	)
-v-	)
THE CITY OF FONTANA, a Municipal Corporation; ROBERT MEJIA; LARRY SMITH; NATHAN A. SIMON; CHARLES A. KOEHLER; BEN ABERNATHY; BILL FREEMAN; DONALD F. DAY; WILLIAM KRAGNESS; JACK RATELLE; JOHN M. RAGER; and KATHY WILSON,	)
Defendants-Appellees.	)

CASE NUMBER: 82-5896

D.C. NO. CV82-3262-WPG

F-1

APPEAL FROM THE UNITED STATES
DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
HONORABLE WILLIAM P. GRAY,
JUDGE PRESIDING

PLAINTIFFS-APPELLANTS' SUPPLEMENTAL BRIEF

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Appellants

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SONJA RENEE SMITH, et al.,	)
	)
Plaintiffs-Appellants,	)
	)
-v-	)
	)
THE CITY OF FONTANA, et al.,	)
	)
Defendants-Appellees.	)
	)

CASE NUMBER: 82-5896

D.C. NO. CV82-3262-WPG

CERTIFICATION OF INTERESTED PARTIES
PURSUANT TO NINTH CIRCUIT
RULE 13 (b)(3)

Counsel of record for SONJA RENEE SMITH, as Administratrix of the Estate of RUFUS A. SMITH, SR., Deceased, as Guardian Ad Litem for the Minor Children of the Deceased, and Individually; RUFUS A. SMITH, JR., Individually; MARCUS SMITH, a Minor; NETRA SMITH, a Minor;

ANTHONY SMITH, a Minor; JARREN SMITH, a Minor; SHERRI SMITH, a Minor; ARKILLIUS SMITH, a Minor; and TASHIEKA SMITH, a Minor, hereby certify that there are no known interested parties other than those participating in this case.

I certify and declare the foregoing to be true and correct.

Dated this 25th day of February, 1986, at Upland, CA.

BY: _____
ANDRENA G. DANCER and
CHARLES B. JOHNSON,
Attorneys for Plaintiffs-
Appellants

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SONJA RENEE SMITH, as Administratrix of the Estate of RUFUS A. SMITH, SR., Deceased, as Guardian Ad Litem for the Minor Children of the Deceased, and Individually; RUFUS A. SMITH, JR., Individually; MARCUS SMITH, a Minor; NETRA SMITH, a Minor; ANTHONY SMITH, a Minor; JARREN SMITH, a Minor; SHERRI SMITH, a Minor; ARKILLIUS SMITH, a Minor; and TASHIEKA SMITH, a Minor,

Plaintiffs-Appellants,

-v-

THE CITY OF FONTANA, a Municipal Corporation; ROBERT MEJIA; LARRY SMITH; NATHAN A. SIMON; CHARLES A. KOEHLER; BEN ABERNATHY; BILL FREEMAN; DONALD F. DAY; WILLIAM KRAGNESS; JACK PATELLE; JOHN M. RAGER; and KATHY WILSON,

Defendants-Appellees.

CASE NUMBER: 82-5896

D.C. NO. CV82-3262-WPG

F-10

PLAINTIFFS-APPELLANTS' SUPPLEMENTAL BRIEF

STATEMENT OF LEGAL ISSUE

To what extent do the rulings in DANIELS v. WILLIAMS, No. 84-5872 (U.S. January 21, 1986); HAYGOOD v. YOUNGER, 769 F 2d 1350 (9th Cir. 1985) (en banc); PIATT v. MACDOUGALL, 773 F 2d 1032 (9th Cir. 1985) (en banc); and BRETZ v. KELMAN, 773 F.2d 1026 (9th Cir. 1985) (en banc) have an effect on Plaintiffs-Appellants' 42 U.S.C. Section 1983 claims?

STATEMENT OF FACTS

Plaintiffs-Appellants incorporate herein, by reference, the Statement of Facts contained in their Opening Brief, on file herein, as if fully set forth.

ARGUMENT

I

ALTHOUGH THE HOLDING IN DANIELS V. WILLIAMS IS INAPPOSITE TO THE FACTS OF THE INSTANT CASE, THE COURT'S RATIONALE IS INSTRUCTIVE IN DETERMINING THAT THE INTENTIONAL DEPRIVATION OF A CONSTITUTIONALLY PROTECTED INTEREST IS STILL ACTIONABLE UNDER 42 U.S.C. SECTION 1983.

A.

INTRODUCTION

In DANIELS v. WILLIAMS, supra, the court held: "The Due Process Clause is not implicated by a state official's negligent act causing unintended loss of or injury to life, liberty, or property" [DANIELS (1986) 54 USLW 4090 (emphasis added)].

In reaching this conclusion, the Court clarified, and repudiated in part, its decision in PARRATT v. TAYLOR, 451 U.S. 527 (1981), upon which the court

in RUTLEDGE v. ARIZONA BOARD OF REGENTS, 660 F 2d 1345 (1981), heavily relied in finding that, where an adequate postdeprivation hearing is available to the plaintiff under state law, the due process requirement of the Fourteenth Amendment is satisfied. In such cases, according to RUTLEDGE, a cause of action under 42 U.S.C. Section 1983 will not lie.

Expanding upon the theory expressed in RUTLEDGE, the lower court in the instant case found that all personal injury actions cognizable under state law are no longer actionable under Section 1983 and, thus, dismissed the Complaint herein. Plaintiffs-Appellants appealed this decision and argued in their Opening Brief that such was not the result intended by either PARRATT or

RUTLEDGE. We now see, from the recent decision in DANIELS, that the United States Supreme Court is in complete agreement with the argument urged by Plaintiffs-Appellants in the instant appeal; i.e., that Section 1983 is not "largely historical", as expressed by the lower court herein [RT, 5], and that the federal courts will still afford relief to plaintiffs under that statute, except in a very limited class of cases.

The DANIELS decision provides more guidance than that offered in PARRATT for determining which types of civil rights claims will have continued viability under the provisions of Section 1983. The Court's discussion in DANIELS is particularly illuminating in that, by specifically excluding certain types of cases from the Section 1983

cause of action, the Court creates the presumption that those cases which do not fall within the excluded category are still actionable.

The excluded cases are those which involve merely negligent conduct by state officials resulting in unintended loss or injury, as exemplified by the facts in DANIELS. The facts in DANIELS, however, are highly distinguishable from those in the instant case, and the holding is, thus, inapposite to this appeal.

B.

THE FACTS AND RATIONALE OF DANIELS v. WILLIAMS

In DANIELS, plaintiff-petitioner was a former inmate of a city jail in Richmond, Virginia who sued under Section 1983, alleging that, while incarcerated, he slipped and fell on a

pillow negligently left on a stairway by one of the correctional deputies stationed at the jail. Plaintiff petitioner suffered injuries to his back and ankle and claimed in his lawsuit that he had been deprived of his liberty interest in freedom from bodily injury. He argued further that he had no adequate state remedy because defendant-respondent was entitled to the defense of sovereign immunity in the state tort proceeding. As such, plaintiff-petitioner contended, the alleged deprivation of his liberty was without due process of law.

The defense motion for summary judgment was granted and, on reconsideration en banc, the Court of Appeals for the 4th Circuit affirmed the judgment on the basis that "negligent

infliction of bodily injury, unlike the negligent loss of property in PARRATT does not constitute a deprivation of any interest protected by the Due Process Clause". The en banc Court went on to unanimously decide that "even if a prisoner is entitled to some remedy for personal injuries attributable to the negligence of state officials, PARRATT would bar petitioner's claim if the State provided an adequate postdeprivation remedy" [DANIELS supra, at 4091 (emphasis added)].

The U.S. Supreme Court affirmed the decision of the 4th Circuit Court of Appeals after granting certiorari, "because of the inconsistent approaches taken by lower courts in determining when tortious conduct by state officials rises to the level of a constitutional

tort, and the apparent lack of adequate guidance from this Court" (Id).

It is clear from the above language, then, that the U.S. Supreme Court still recognizes the existence of a "constitutional tort" and that RUTLEDGE cannot be construed, as interpreted by the lower court in the instant case, as "doing away with" the Section 1983 cause of action relative to all personal injury claims which are litigable in a state court proceeding. Certain personal injury claims are still actionable under Section 1983 and, according to the rationale in DANIELS the case at bench is one of them, as will be discussed infra.

II

A CLAIM FOR RELIEF UNDER 42 U.S.C. SECTION 1983 MAY BE MAINTAINED WHERE PLAINTIFF CAN PROVE THE VIOLATION OF A CONSTITUTIONAL RIGHT AND WHERE THERE HAS BEEN AN AFFIRMATIVE ABUSE OF POWER.

The U.S. Supreme Court concluded in PARRATT, and affirmed in DANIELS, that Section 1983 contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right. According to the rationale in DANIELS, however, state of mind is an appropriate consideration in determining whether deprivation of a constitutionally protected interest has occurred. To that end, the Court stated:

> "But in any given Section 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to

state a claim" [DANIELS, supra, at 4091].

This language suggests that not only is state of mind a relevant consideration, but the Court may also consider the type of right which is alleged to have been violated in determining whether a claim is actionable under Section 1983. Thus, for example, to support a claim of racial discrimination under the Equal Protection Clause, a showing of an "invidious discriminatory purpose" is required [Id., citing ARLINGTON HEIGHTS v. METROPOLITAN HOUSING DEV. CORP., 429 U.S. 252 (1977)]. Similarly, "deliberate indifference" to a prisoner's serious illness or injury is sufficient to constitute cruel and unusual punishment under the Eighth

Amendment [Id., citing ESTELLE v. GAMBLE, 429 U.S. 97, 105 (1976)].

In the instant case, the Complaint alleges, on Page 8 at Paragraph 33, that:

> "RUFUS A. SMITH, SR., was the victim of summary execution at the hands of defendants MEJIA and SMITH. The punishment administered was grossly disproportionate to whatever RUFUS A. SMITH, SR.'S actions may have been, constituted cruel and unusual punishment, and deprived him of his right to due process of law under the laws and Constitution of the United States, in particular the Fourth, Eighth, and Fourteenth Amendments thereof. The shooting of RUFUS A. SMITH, SR., by the defendants MEJIA and SMITH, was unwarranted, cruel, inhuman, unjustifiable, and excessive."

The Complaint further alleges on Page 9 at Paragraph 37 that:

> Defendants MEJIA and SMITH, acted willfully, maliciously, intentionally, oppressively, and in reckless disregard of

> the possible consequences of their conduct..." (emphasis added).

It cannot be fairly said, then, that Plaintiffs-Appellants herein have alleged, even remotely, that the acts of Defendants-Appellees were merely negligent. Nor can it be legitimately argued that the type of rights alleged to have been violated by Defendants-Appellees amount to minor interests, which would tend to trivialize or grossly distort the meaning and intent of the Constitution. On the contrary, the Complaint clearly alleges that the decedent was deprived of his LIFE, in violation of his right to be free from cruel and unusual punishment, and without due process of law. Such a result is vastly different from the negligent, or even intentional,

deprivation of such relatively minor interests as property or liberty. Here, we are talking about the deliberate and malicious destruction of a human being, accomplished under color of state law, and in direct abuse of power. This is the very type of case for which Section 1983 was originally enacted, and is still intended to redress.

It is clear, from the Court's discussion in DANIELS, that it never intended its ruling in PARRATT to reach anything other than negligent conduct. In fact, in rejecting the argument of one of the petitioners in DANIELS, that "artful litigants, undeterred by a requirement that they plead more than mere negligence, will often be able to allege sufficient facts to support a

claim of intentional deprivation", the court stated, inter alia:

> "More important, the difference between one end of the spectrum--negligence--and the other--intent--is abundantly clear... In any event, we decline to trivialize the Due Process Clause in an effort to simplify constitutional litigation" [Id., at 4092]. Moreover, in stating that: "...this case affords us no occasion to consider whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause", [Id., at fn. 3],

the Court is affirmatively articulating the premise that intentional conduct is enough to trigger the protections of the Due Process Clause.

Accordingly, the holding in DANIELS does not preclude the Plaintiffs-Appellants herein from maintaining a Section 1983 cause of action, in that

their case concerns the intentional deprivation of the most important of all constitutionally protected rights--the right to life, without due process of law. The lower court ruling dismissing the Complaint, therefore, must be reversed.

III

UNDER HAYGOOD v. YOUNGER, PLAINTIFFS-APPELLANTS HAVE A VALID SECTION 1983 CAUSE OF ACTION IN THAT THE COMPLAINT ALLEGES A VIOLATION OF THE EIGHTH AMENDMENT RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT AND THAT DECEDENT WAS DEPRIVED OF HIS LIFE WITHOUT DUE PROCESS OF LAW.

Prior to reaching its decision in HAYGOOD v. YOUNGER, 769 F 2d 1350 (1985), which was considered en banc along with PIATT v. MACDOUGALL, 773 F 2d 1032 (1985), and BRETZ v. KELMAN, 773 F

2d. 1026 (1985), the U.S. Court of Appeals for the Ninth Circuit stated:

> "The law in this circuit and elsewhere is controlled by the Supreme Court opinions in PARRATT v. TAYLOR (supra); LOGAN v. ZIMMERMAN BRUSH CO., 455 U.S. 422, 102 S.Ct. 1148, 68 L.Ed. 2d 265 (1982); and HUDSON v. PALMER, ___U.S. ___, 104 S.Ct. 3194, 82 L.Ed. 2d 393 (1984). Those three cases shed recent light upon any analysis of claims under Section 1983" [HAYGOOD, supra, at 1352].

The Court went on to state that:

> "In any Section 1983 action, the first question is whether Section 1983 is the appropriate avenue to remedy the alleged wrong. We reach the issue of these defendants' Section 1983 liability only if we find that the two essential elements to a Section 1983 action are present: (1) the defendants acted under color of law, and (2) their conduct deprived Haygood of a constitutional right" [Id., at 1353 and 1354, citing 42 U.S.C. Section 1983].

In keeping with its self-prescribed formula for analyzing claims brought under Section 1983, the Court concluded that HAYGOOD was an appropriate Section 1983 case under two distinct theories: (1) The defendants-appellants were liable because the plaintiff-appellee's unlawful incarceration constituted cruel and unusual punishment in violation of the Eighth Amendment; and (2) The defendants appellants were liable because plaintiff-appellee had been deprived of his liberty without due process of law.

A.

AS IN HAYGOOD, THE DEFENDANTS-APPELLEES IN THE INSTANT CASE ARE LIABLE UNDER SECTION 1983 FOR VIOLATING DECEDENT'S EIGHTH AMENDMENT RIGHTS.

The Court in HAYGOOD quickly disposed of the threshold question in its analysis, that of whether the defendants had acted under color of law. Finding that the defendants had so acted because they "were clothed with the legitimacy of the government and were purporting to act thereunder" [HAYGOOD, supra at 1354, citing MONROE v. PAPE, 365 U.S. 167, 172-87, 81 S.Ct. 473, 476-484, 5 L. Ed. 2d 492 (1961)], the Court proceeded to the next phase of its analysis and determined that HAYGOOD had been deprived of a constitutional right because he had been imprisoned for five years longer than he should have been

under the state's own sentencing laws and, thus, was subjected to cruel and unusual punishment.

The same result must be reached following a similar analysis of the facts in the instant case.

The Complaint herein alleges on Pages 3 through 6, inclusive, at Paragraphs 13 through 23, inclusive, that the defendants consisted of a governmental entity and its agents, officers, and employees, and that they were acting, or omitting to act, individually and in their official governmental capacities. As in HAYGOOD, the Court need not be detained in concluding that these Defendants-Appellees acted under color of law.

The Complaint further alleges on Pages 7 through 9, inclusive, at

Paragraphs 29, 30, 32, and 33, that, in the course of responding to a call regarding a family quarrel, the defendant police officers physically attacked, and then shot and killed, the decedent, who was unarmed and helpless, offered only instinctive resistance, and posed no threat to the safety of said police officers.

If the above set of facts can be proven at trial, a jury can certainly find that the decedent herein was subjected to cruel and unusual punishment in violation of the Eighth Amendment, for, "to be cruel and unusual, punishment must be incompatible with 'the evolving standards of decency that mark the progress of a maturing society', or must involve unnecessary or wanton pain disproportionate to the

severity of the crime" [Id., citing TROP v. DULLES, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed. 2d 630 (1958); and SOLEM v. HELM, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed. 2d 637 (1983)]. An act may also constitute cruel and unusual punishment if it is "the result of 'deliberate indifference'" to the protected interest in question. [ESTELLE v. GAMBLE, 429 U.S. 97, 104-06, 97 S.Ct. 285, 291-92, 50 L.Ed. 2d 251 (1976)].

An unprovoked police shooting of an unarmed individual is, without question, incompatible with present standards of societal decency, and demonstrates a markedly deliberate indifference to the sanctity of human life. Also, the pain which decedent must have suffered during the course of the physical attack, as

well as from the shooting, was grossly disproportionate to his "crime" of having engaged in a family quarrel.

On the Eighth Amendment theory alone, then, Plaintiffs-Appellants have stated a valid Section 1983 claim if we are to be guided by the analytical principles of HAYGOOD v. WILLIAMS.

B.

THE DEFENDANTS-APPELLEES IN THE INSTANT CASE ARE LIABLE UNDER SECTION 1983 FOR INTENTIONALLY DEPRIVING DECEDENT OF HIS LIFE WITHOUT DUE PROCESS OF LAW.

The Court in HAYGOOD cites the principle expressed in MORRISSEY v. BREWER, 408 U.S. 471, 481-82, 92 S.Ct. 2593, 2600-01, 33 L.Ed 2d 484 (1972), that "adequate, or due, process depends upon the nature of the interest affected", and that "the more important

the interest and the greater the effect of its impairment, the greater the procedural safeguards the state must provide to satisfy due process" [Id., at 1355 and 1356].

Expanding upon that principle, the Court goes on to conclude that:

> "All denials of life, liberty or property will fall somewhere on a continuum between relatively minor effects on nonconstitutional interests at one end, and the loss of life at the other. On that continuum, we recognize that a denial of liberty will often have a more grave effect upon the victim than will a deprivation of property" [Id., at 1356].

An appropriate extension of the above premise is that deprivation of life will, in the majority of instances, have a more devastating effect on the victim and the victim's family, than will a deprivation of either liberty or

property, and, thus, requires the greatest of all procedural safeguards. To the extent that the instant case relies upon the theory that decedent was intentionally deprived of his life, under color of law, and without due process, a valid Section 1983 claim is stated. It is unnecessary to consider here whether PARRATT, supra, or LOGAN, supra, is the controlling case authority for making this determination, as the Court was required to do in HAYGOOD, because the case at bench involves a separate and distinct right, and a separate and distinct fact situation which HAYGOOD doesn't reach. This Court, therefore, must accept guidance from the United States Supreme Court's clarifying opinion in DANIELS, supra, which bars only negligence claims from

litigation under Section 1983, as well as follow its own reasoning expressed in such cases as HAYGOOD, which pertain to the comparative importance of individual rights within the context of federal regulation of state intervention, power, and control.

The issue in the instant case is far from being complicated as it relates to its actionability under Section 1983. Due process can never be satisfied with respect to the intentional deprivation of a human life under color of law, unless there has first been the commission of crime, a conviction of that crime in a court of law, and a duly imposed sentence of capital punishment. Inasmuch as the decedent herein was not afforded those safeguards, his estate and his heirs are absolutely entitled to

bring this action under Section 1983, subject to any defenses which Defendants-Appellees may have.

IV

THE HOLDINGS IN PIATT V. MACDOUGALL AND BRETZ V. KELMAN PROVIDE REINFORCEMENT FOR THE VALIDITY OF PLAINTIFFS-APPELLANTS' SECTION 1983 CLAIMS.

In PIATT v. MACDOUGALL, supra, the Court held that the State of Arizona had not deprived PIATT of his liberty without due process of law by forcing him to work without pay while incarcerated in an Arizona prison, because the Thirteenth Amendment does not prohibit involuntary servitude as punishment for the commission of a crime. To that extent, PIATT had failed to state a cause of action under Section 1983.

The Court found that PIATT had been deprived of his property right to state-mandated compensation, however, and that the deprivation occurred as the result of the deliberate, considered, and routine failure of the prison director to compensate prisoners under the applicable Arizona statute. In so finding, the Court held that PIATT had stated a valid claim under Section 1983 and remanded the case to the lower court for a determination as to whether PIATT had actually performed the work for which he was claiming compensation.

The Court's rationale for its ruling in PIATT, included a consideration of whether the plaintiff-appellant was entitled to a hearing on his property interest claim before or after the alleged deprivation.

For instruction on that issue, the Court considered the holding in PARRATT, supra, that:

> "...a state may satisfy the constitutional requirements for a hearing through process provided as a remedy after a deprivation has occurred, in lieu of preventative process, when the deprivation is the result of random, unauthorized and negligent conduct by state officials, and where it is either impracticable or impossible for the state to provide preventative process because the state cannot have foreseen the potential deprivation" [PIATT, supra, at 1036, citing PARRATT, supra, (emphasis added)].

The Court interpreted this language to mean that remedial process is not available where the deprivation was not random or where advance process was practical. "The considerations underlying PARRATT are simply inapplicable to deliberate, planned, or prescribed conduct by state officials,

whether or not such conduct is authorized" [Id.].

The Court made a similar analysis in BRETZ v. KELMAN, supra, where it held that a valid Section 1983 claim had been stated on BRETZ'S complaint that he had been deprived of liberty without due process when, due to various forms of prosecutorial misconduct, he was falsely imprisoned in a maximum security facility. To that end, the court stated:

> "It is meaningless to speak of the state's ability to provide postdeprivation remedial process where the state process itself has been abused. Consequently,...the state cannot satisfy the due process clause here by providing BRETZ with a postdeprivation remedy in state court in the form of a tort action for malicious prosecution" [BRETZ, supra, at 1032].

In the instant case, the Complaint alleges on Pages 11 and 12, at Paragraphs 48, 49, and 50, that, prior to, and including, the date of the decedent's death, "defendants had condoned and enforced as policy, practice, and custom, the use by Fontana police officers of excessive and deadly force and, particularly, the use of such force discriminatorily against Black persons, thereby denying Black persons equal protection of the laws"; that Black citizens had "consistently been the targets of unpunished, arbitrary, and discriminatory use of excessive and deadly force by Fontana police officers"; and that defendants, in failing to enforce state law and police department regulations pertaining to the use of force and deadly force, created

"an atmosphere of lawlessness in which police officers employ excessive and illegal force and violence, including deadly force".

Given the truth of the above allegations, the actions of the Defendants-Appellees in the case at bench were clearly deliberate and considered, within the meaning of PIATT. As such, the availability of postdeprivation remedial process is not a legitimate concern in the determination of whether Plaintiffs-Appellants have stated a cause of action under Section 1983. Also, the abuse of state process which prevented defendants-appellees from achieving a dismissal of the Section 1983 claim in BRETZ, is akin to the abuse of power alleged in the Complaint

herein. In any event, although neither BRETZ nor PIATT is strictly applicable to the facts of the instant case, they do provide support for the central premise underlying this appeal--that Section 1983 has not been relegated to the pages of history, and is the appropriate statute for litigating this claim.

CONCLUSION

The U.S. Supreme Court decision in DANIELS v. WILLIAMS has rendered moot much of the controversy abounding in the lower courts pertaining to the continued relevance of the Section 1983 cause of action to claims actionable in state court. It is now clear from that decision, as well as from the Ninth Circuit opinions expressed in HAYGOOD v.

YOUNGER, PIATT v. MACDOUGALL, and BRETZ v. KELMAN, that Section 1983 remains a viable statute for redressing serious violations of constitutionally protected rights. It is equally clear, for the reasons stated herein, that the lower court decision to dismiss the instant Complaint must be reversed.

DATED: February 25, 1986.

Respectfully submitted,

By:_____
ANDRENA G. DANCER and
CHARLES B. JOHNSON,
Attorneys for Plaintiffs-Appellants

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SONJA RENEE SMITH, et al.,	)
	)
Plaintiffs-Appellants,	)
	)
-v-	)
	)
THE CITY OF FONTANA, et al.,	)
	)
Defendants-Appellees.	)

CASE NUMBER: 82-5896

D.C. NO. CV82-3262-WPG

STATEMENT OF RELATED CASES PURSUANT TO NINTH CIRCUIT RULE 13 (b)(4)

Counsel of record for SONJA RENEE SMITH, as Administratrix of the Estate of RUFUS A. SMITH, SR., Deceased, as Guardian Ad Litem for the Minor Children of the Deceased, and Individually; RUFUS A. SMITH, JR., Individually; MARCUS SMITH, a Minor; NETRA SMITH, a Minor;

ANTHONY SMITH, a Minor; JARREN SMITH, a Minor; SHERRI SMITH, a Minor; ARKILLIUS SMITH, a Minor; and TASHIEKA SMITH, a Minor, hereby state that, other than the cases stated within this supplemental brief, there are no known cases in this Court that are deemed related.

Dated this 25th day of February, 1986, at Upland, CA.

By:_____
ANDRENA G. DANCER and
CHARLES B. JOHNSON,
Attorneys for Plaintiffs-Appellants

APPENDIX G

NO. 82-5896

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SONJA RENEE SMITH, as Administratrix of the Estate of RUFUS A. SMITH, SR., Deceased, as Guardian ad litem for the Minor Children of the Deceased, and Individually; RUFUS ANTHONY SMITH, JR., Individually; and MARCUS SMITH, a Minor; NETRA SMITH, a Minor; ANTHONY SMITH, a Minor; JARREN SMITH, a Minor; SHERRI SMITH, a Minor; ARKILLIUS SMITH, a Minor; and TASHIEKA SMITH, a Minor,

Plaintiffs-Appellants,

vs.

THE CITY OF FONTANA, a Municipal Corporation, ROBERT MEJIA, LARRY SMITH, NATHAN A. SIMON, CHARLES A. KOEHLER, BEN ABERNATHY, BILL FREEMAN, DONALD F. DAY, WILLIAM KRAGNESS, JACK RATELLE, JOHN M. RAGER, and KATHY WILSON,

Defendants-Appellees.

Appeal From The United States District Court

Central District of California
Honorable William P. Gray,
Judge Presiding

APPELLEES' BRIEF

COTKIN, COLLINS, KOLTS & FRANSCELL

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SONJA RENEE SMITH, etc., et al.,

Plaintiffs-Appellants,

vs.

THE CITY OF FONTANA, etc., et al.,

Defendants-Appellees.

CERTIFICATION OF INTERESTED PARTIES
AS REQUIRED BY
NINTH CIRCUIT RULE 13(b)(3)

We, the undersigned, counsel of record for The City of Fontana, Robert Mejia, Larry Smith, Nathan A. Simon, Charles A. Koehler, Ben Abernathy, Bill Freeman, Donald F. Day, William Kragness, Jack Ratelle, John M. Rager,

and Kathy Wilson, hereby certify that there are no known interested parties other than those participating in this case.

I certify and declare the foregoing to be true and correct.

DATED: February 17, 1983, at North Hollywood, California.

COTKIN, COLLINS, KOLTS
& FRANSCELL

BY: GEORGE J. FRANSCELL
BRADLEY C. WITHERS

Attorneys for Defendants-Appellees

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NO. 82-5896

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SONJA RENEE SMITH, as Administratrix of the Estate of RUFUS A.SMITH, SR., Deceased, as Guardian ad litem for the Minor Children of the Deceased, and Individually; RUFUS ANTHONY SMITH, JR., Individually; and MARCUS SMITH, a Minor; NETRA SMITH, a Minor; ANTHONY SMITH, a Minor; JARREN SMITH, a Minor; SHERRI SMITH, a Minor; ARKILLIUS SMITH, a Minor; and TASHIEKA SMITH, a Minor,

Plaintiffs-Appellants,

vs.

THE CITY OF FONTANA, a Municipal Corporation, ROBERT MEJIA, LARRY SMITH, NATHAN A. SIMON, CHARLES A. KOEHLER, BEN ABERNATHY, BILL FREEMAN, DONALD F. DAY, WILLIAM KRAGNESS, JACK RATELLE, JOHN M. RAGER, and KATHY WILSON,

Defendants-Appellees.

APPELLEES' BRIEF

STATEMENT OF LEGAL ISSUE

1. Under Rutledge v. Arizona Board of Regents, did the District Court properly dismiss the civil rights claims of the plaintiffs-appellants on the basis that an adequate post-deprivation remedy exists under State tort law?

STATEMENT OF THE CASE

1. NATURE OF THE CASE

On July 1, 1982, the plaintiffs-appellants initiated a civil rights action in the United States District Court, for the Central District of California, seeking recovery under Title 42 U.S.C. §1981, et seq., and certain common law tort theories (C,

1-24).[1] In their complaint, the plaintiffs-appellants essentially alleged that two of the defendants-appellees (Officers Smith and Mejia), in investigating a family quarrel, wrongfully caused the death of Mr. Rufus A. Smith. The plaintiffs-appellants are Mr. Smith's estate, and also his nine children.

2. LOWER COURT PROCEEDINGS

In response to the plaintiffs-appellants' complaint, the defendants-appellees timely filed a Motion to Dismiss under Rule 12(B)(6),

---

[1] The same abbreviations as employed in the Appellants' Opening Brief in reference to the record of proceedings in the lower Court are used herein. In addition, the abbreviation "AB" is employed herein to refer to the Appellants' Opening Brief.

Federal Rules of Civil Procedure. In relevant part, the defendants-appellees argued in the motion that the civil rights claims of the plaintiffs-appellants merited dismissal under Rutledge v. Arizona Board of Regents, 660 F.2d 1345 (1981)[2]; on the basis that adequate post-deprivation state tort remedies existed for the plaintiffs-appellants' claims. (M, 6-7). At the August 23, 1982 hearing on the motion, the Honorable William P. Gray, United States District Court Judge

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[2]As indicated in the Motion to Dismiss, the United States Supreme Court granted a Petition for Writ of Certiorari in Rutledge, on July 2, 1982, ___U.S.___ ___ S.Ct.___, 73 L.Ed.2d 1382. However, the issue on appeal is limited to the question of whether Title 42 U.S.C. §1985(3) is applicable only when invidious discrimination against a class is alleged. As such, the appeal does not affect the portion of Rutledge relating to adequacy of State tort remedies.

presiding, granted the motion on this ground and dismissed the entire lawsuit. (T, 3-4).

The defendants-appellees acknowledge that the District Court's Order of dismissal is properly appealable, and that the plaintiffs-appellants' Notice of Appeal was timely filed.

3. STATEMENT OF RELEVANT FACTS

While the defendant-appellees believe that the Statement of Facts contained in the plaintiffs-appellants' Opening Brief frequently embellishes the actual record of the lower Court proceedings[3/], the defendants-appellees

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3/The record as cited by the plaintiffs-appellants in their Opening Brief does not support the statements that Mr. Smith "had been visiting at an (continued...)

nevertheless adopt it as an adequate statement of the factual allegations relevant to the legal issue presented for review.

ARGUMENT

I.

RUTLEDGE v. ARIZONA BOARD OF REGENTS IS DIRECTLY APPLICABLE TO THE FACTS OF THE INSTANT CASE

In Rutledge v. Arizona Board of Regents, supra, this Court adopted the rule that redress under the Civil Rights Act is precluded if the post-deprivation state tort remedies available to the

---

3/(...continued)
apartment" (AB, 4), that he was "involved in a family argument" (AB, 4), or that he was "enroute to his automobile" (AB, 4) before arrival of the two officers. Nor does the record support that he was "later transported to Loma Linda University Medical Center" for emergency surgery following the shooting incident. (AB, 5).

complaining party are adequate. In Rutledge, a former scholarship football player alleged that the University football coach (Frank Kush) violated his federal civil rights by striking him during a football game. On the basis that the football coach's actions constituted a deprivation of the player's constitutionally protected liberty interest, this Court nevertheless dismissed the player's Title 42 U.S.C. §1983, et seq., lawsuit upon finding that the available post-deprivation state tort remedies for assault and battery were adequate. Id. at 1352.

The defendants-appellees respectfully submit that the Rutledge rationale is fully applicable to the instant case. In their Opening Brief,

the plaintiffs-appellants attack Rutledge on two major grounds: (1) the Rutledge rationale should only apply to civil rights cases involving alleged deprivation of property interests, not liberty interests (AB, 8-12); and (2) the Rutledge rational should only apply in civil rights cases involving alleged negligent deprivation of constitutionally-protected interests, not intentional or reckless deprivations. (AB, 9-10). Based on the following discussion, the defendants-appellees contend that these two arguments are unconvincing.

A. THE RUTLEDGE RATIONALE APPLIES TO CIVIL RIGHTS CASES INVOLVING ALLEGED DEPRIVATION OF LIBERTY INTERESTS, AS WELL AS ALLEGED DEPRIVATIONS OF PROPERTY INTERESTS

In Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), the United States Supreme Court held that an inmate's Title 42 U.S.C. §1983 action for negligent deprivation of his property failed to state a cognizable claim, where adequate post-deprivation state tort remedies existed for his claim. The subsequent federal case law has unanimously followed this holding in situations involving alleged deprivations of property interests. See e.g., Logan v. Zimmerman Brush Co., ___ U.S.___, 102 S.Ct.___, 71 L.Ed.2d 265 (1982).

In the instant appeal, the plaintiffs-appellants argue that Rutledge represents an unwarranted extension of the principles articulated in Parratt to civil rights cases

involving alleged deprivation of liberty interests. (AB, 8 9). According to the plaintiffs-appellants, one reason why such an extension is unwarranted is that Parratt requires a claimant to be given a hearing before he is finally deprived of his constitutionally-protected interest. (AB, 12-14). The plaintiffs-appellants believe that a post-deprivation hearing can never meet this requirement in the context of liberty interests, on the basis that once liberty is gone it can never be recovered. (AB, 12-14).

In support of this position, the plaintiffs-appellants principally rely upon Wakinekona v. Olim, 664 F.2d 708 (9th Cir., 1981) (as amended), cert. granted, ___U.S.___ S.Ct.____73 L.Ed.2d 1299 (June 1, 1982), which was decided

by a different panel of this Court two weeks after Rutledge. Briefly stated, this other panel considered the effect of Parratt in an appeal by a Hawaii state prisoner who allegedly had been transferred to a California prison in contra vention of his constitutionally-protected liberty interests. Without citing to Rutledge, the Court on petition for rehearing distinguished Parratt. "The present case", the Court held, "dealing with a liberty interest is of a wholly different nature". Id. at 715.

In response, the defendants-appellees acknowledge that Parratt itself only involved an alleged deprivation of property interest. However, the decision in part relied upon a line of property seizure cases

holding that deferral of the hearing until after seizure may be justified by exigent circumstances. 451 U.S. at 539-540. The reasoning of those cases, based upon the impracticability of a predeprivation hearing, supports the adequacy of a post deprivation hearing in civil rights cases involving the alleged deprivation of liberty interests. As discussed in Parratt, the United States Supreme Court already addressed this issue in Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), in the context of corporal punishment in public schools. There, despite the alleged intentional deprivation of liberty interests by such punishment, the Supreme Court affirmed dismissal of the suit in part on the basis that adequate state common law

safe guards existed. 430 U.S. at 682.4/

Given Rutledge and Ingraham, the defendants-appellees therefore submit that civil rights claims involving alleged deprivations of liberty interests are subject to dismissal where adequate post-deprivation state tort

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4/A variant of the plaintiffs-appellants' argument is that even if Parratt extends to civil rights claims involving alleged deprivation of liberty interest, the seriousness of Mr. Smith's injury differentiates the instant appeal from situations like those in Rutledge and Ingraham. (AB, 15). Admittedly, the seriousness of injury may be relevant in determining whether a constitutional tort has occurred. Meredith v. State of Arizona, 523 F.2d 481 (9th Cir. 1975). However, as the Honorable William P. Gray observed during oral argument on the defendants-appellees' Motion to Dismiss, any distinction based upon the alleged seriousness of injury once a constitutional tort is found is immaterial so long as the state post-deprivation remedy proves adequate. (T, 6).

remedies exist. See also, Ellis v. Hamilton, 669 F.2d 510, (7th Cir., 1982) app. pending [Seventh Circuit applied Parratt in an alleged deprivation of liberty interest claim]; Cf. Maurer v. Ind. And As Members of Los Angeles City, 691 F.2d 434 (9th Cir., 1982) [Ninth Circuit analyzed whether adequate state remedy existed in a §1983 action involving an alleged deprivation of liberty interest].

B. THE RUTLEDGE RATIONALE APPLIES TO CIVIL RIGHTS CASES INVOLVING ALLEGED INTENTIONAL OR RECKLESS DEPRIVATIONS OF CONSTITUTIONALLY PROTECTED RIGHTS, AS WELL AS NEGLIGENT DEPRIVATIONS

The second major argument by the plaintiffs appellants is that the Rutledge rationale should not extend to civil rights cases involving alleged

intentional or reckless deprivations of constitutionally-protected rights, as distinguished from actions alleging negligent deprivations. (AB, 11). The plaintiffs-appellants primarily rely upon the concurring opinion of Blackmun, J., in Parratt, 451 U.S. at 546, as support for this proposition.

In rebuttal, however, both Ingraham and Rutledge dictate an opposite conclusion. As discussed in the above section, the United States Supreme Court in Ingraham found that adequate state tort remedies existed precluding the plain tiffs from pursuing a civil rights action, even though the conduct of defendants was alleged to be intentional. 430 U.S. at 655-657. In similar fashion, Rutledge involved

alleged intentional conduct on the part of the defendant football coach, in assaulting and battering the plaintiff. 660 F.2d at 1352. See also Henderson v. Counts, 544 F.Supp 149, 151 (E.D. Virg., 1982) [District Court held that Parratt's rationale "also applies to intentional non property takings such as . . . assault and battery"].

Independent of the above caselaw, it is difficult to imagine what legal justification would exist for adopting the bifurcated approach proposed by plaintiffs-appellants. Under Parratt, the United States Supreme Court ruled that Title 42 U.S.C. §1983 does not require a claimant to show that a defendant acted with any particular "state of mind" in order for liability

to be imposed. 451 U.S. at 534. Therefore, Parratt mandates that distinctions based upon "state of mind", as attempted to be made here by the plaintiffs-appellants, are inappropriate. Instead, the proper inquiry under Parratt and Rutledge is whether the available post-deprivation state tort remedies are adequate to provide the claimant with due process.

II.

SOUND POLICY AND HISTORICAL CONSIDERATIONS DICTATE ADHERENCE TO THE RUTLEDGE RATIONALE

The plaintiffs-appellants dispute the observation by the Honorable William P. Gray, in granting the subject Motion to Dismiss, that the value of the Civil Rights Act is largely historical. (AB, 15a-16). The plaintiffs-appellants

exhaustively discuss Monroe v. Pape, 365 U.S. 167, 91 S.Ct. 473, 5 L.Ed.2d 492 (1961), in an attempt to refute this statement.5/ Furthermore, the plaintiffs-appellants make the additional allegation, totally unsupported by the record, that the civil rights statute is not historical in the context of the instant appeal, because the Klu Klux Klan is purportedly "still alive and well" in the City of Fontana, where the incidents, alleged in

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5/It is important to recognize that Parratt and Rutledge are not exhaustion cases. Unlike Monroe v. Pape, these cases do not involve the issue of whether state remedies have to be pursued before a Federal Court action can be maintained. Instead, these cases involve the very different issue of whether the availability of post-deprivation state remedies are adequate to render alleged deprivations as ones satisfying due process of law.

the plaintiffs appellants' complaint occurred. (AB, 17).[6/]

The defendants-appellees submit that the 1871 Civil Rights Act is historical in certain important respects. Where an adequate state post-deprivation remedy exist, there is no cogent reason why litigation should remain in Federal Court. As acknowledged by the plaintiffs-appellants the Federal Courts have been flooded over the past several years by §1983 claims. (AB, 18).

6/As noted above, this allegation is in no fashion supported by the record of the lower Court proceedings. Further, the plaintiffs-appellants do not attempt in their Opening Brief to allege that the purported existence of the Klu Klux Klan in Fontana had any bearing on the incidents involved in this litigation. As such, the plaintiffs-appellants' arguments on this point do not merit considera tion by this Court. Johnson v. United States, 426 F.2d 651, cert dismissed 101 U.S. 846, 91 S.Ct. 1258, 28 L.Ed.2d 523 (4th Cir., 1970).

Adherence to the Rutledge rationale would help to alleviate the situation while ensuring that claimants have an adequate remedy.

CONCLUSION

For all the reasons stated, the judgment of the District court should be affirmed.

Respectfully submitted,
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No. 82-5896

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SONJA RENEE SMITH, etc., et al.,

Plaintiffs-Appellants,

vs.

THE CITY OF FONTANA, etc., et al.,

Defendants-Appellees.

STATEMENT OF RELATED CASES
AS REQUIRED BY
NINTH CIRCUIT RULE 13(b)(4)

We, the undersigned, counsel of record for The City of Fontana, Robert Mejia, Larry Smith, Nathan A. Simon, Charles A. Koehler, Ben Abernathy, Bill Freeman, Donald F. Day, William Kragness, Jack Ratelle, John M. Rager, and Kathy Wilson, hereby state that

other than the cases stated within this brief, there are no other known cases in this Court that are deemed related.

DATED: February 17, 1983, at North Hollywood, California.

COTKIN, COLLINS, KOLTS
& FRANSCELL
BY: GEORGE J. FRANSCELL
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APPENDIX H

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

SONJA RENEE SMITH, as Administratrix of the Estate of RUFUS A. SMITH, SR., Deceased, as Guardian Ad Litem for the minor children of the Deceased, and individually; RUFUS ANTHONY SMITH, JR., individually; and MARCUS SMITH, a minor; NETRA SMITH a minor; ANTHONY SMITH, a minor; JARREN SMITH, a minor; SHERRI SMITH, a minor; ARKILLIUS SMITH, a minor: and TASHIEKA SMITH, a minor,	)
Plaintiffs-Appellants,	)
vs.	)
THE CITY OF FONTANA, a municipal corporation; ROBERT MEJIA; LARRY SMITH; NATHAN A. SIMON; CHARLES A. KOEHLER; BEN ABERNATHY; BILL FREEMAN; DONALD F. DAY; WILLIAM KRAGNESS; JACK RATELLE; JOHN M. RAGER; and KATHY WILSON,	)
Defendants-Appellees,	)

NO. 82-5896

D.C. #CV-82-3262 WPG

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES
DISTRICT COURT CENTRAL DISTRICT
OF CALIFORNIA
HONORABLE WILLIAM P. GRAY
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SONJA RENEE SMITH, as Administratrix of the Estate of RUFUS A. SMITH, SR., Deceased, as the Guardian Ad Litem for the minor children of the Deceased, and individually; RUFUS ANTHONY WQP SMITH, JR., individually; and MARCUS SMITH, a minor; NETRA SMITH, a minor; ANTHONY SMITH, a minor; JARREN SMITH, a minor; SHERRI SMITH a minor; ARKILLIUS SMITH, a minor; and TASHILKA SMITH, a minor,

Plaintiffs-Appellants,

vs.

THE CITY OF FONTANA, a municipal corporation; ROBERT MEJIA; LARRY SMITH; NATHAN A. SIMON; CHARLES A. KOEHLER: BEN ABERNATHY; BILL FREEMAN; DONALD F. DAY; WILLIAM KRAGNESS; JACK RATELLE; JOHN M. RAGER; and KATHY WILSON,

Defendants-Appellees,

No. 82-5896

D.C. No. CV-82-3262-WPG

APPELLANT'S OPENING BRIEF

INTRODUCTION

FOR THE PURPOSES OF CLARITY, references to the record of the proceedings in the lower court will be given the following abbreviations:

1. C,1-2 = Complaint with referenced page numbers.

2. M,3-4 = Motion to Dismiss with referenced page numbers.

3. RM, 5 = Response to Motion to Dismiss with referenced page numbers.

4. T,6-7 = Transcript of Motion Hearing with referenced page numbers.

STATEMENT OF THE CASE

This is an appeal by plaintiffs-appellants from a judgment dismissing their complaint for compensatory and punitive damages in a civil rights action from Federal District Court. The action was brought pursuant to 42 U.S.C. §§ 1981, 1983, 1985(2)(3), 1986, 1988, the Federal and State Constitutions, and common law principles. Plaintiffs-appellants are the estate, and the nine surviving children of RUFUS A. SMITH SR., who suffered injuries, and death on May 27, 1982, at the hands of two officers of the Fontana California Police Department, during their investigation of a family quarrel, allegedly involving MR. SMITH. The lawsuit was instituted in the U.S. District Court, for the Central District

of California, against the defendants-appellees: THE CITY OF FONTANA, Police Officers, LARRY SMITH, and ROBERT MEJIA, and certain duty officials. (C, 1-24).

THRUST OF THE COMPLAINT:

The complaint essentially alleged that the unlawful, malicious, reckless, and grossly negligent acts and/or omissions of defendants-appellees, committed under color of law, and in their official capacities, directly and proximately, caused the injuries and eventual death of MR. SMITH, constituted cruel and unusual punishment, and deprived MR. SMITH, of his constitutional right to due process of law. The complaint further alleged that MR. SMITH, a Black citizen of the

United States, was not afforded equal protection of the laws enjoyed by White citizens, and because of racial prejudice and animosity, was treated with unprovoked, excessive, and ultimately, deadly force by defendant police officer. (C, 7-13). In short, MR. SMITH, was given a street-corner sentence of capital punishment, without having been charged with any type of offense, without benefit of counsel, without benefit of fair and impartial trial in a court of law, without benefit of an opportunity to confront his accusers, and without any of the other benefits applicable to due process, and equal protection standards which are legally and constitutionally guaranteed to all citizens of the United States.

LOWER COURT RULING:

At a motion hearing held on August 23, 1982, pursuant to defendants-appellees' Motion to Dismiss, based upon the decision in Rutledge v. Arizona Board of Regents, (9th Cir., 1981) 660 F.2d 1345; the Honorable William P. Gray, U.S. Judge presiding, dismissed the complaint on the grounds that the Rutledge decision renders the federal court without jurisdiction over 42 U.S.C. §1983, actions where a state court remedy is available, stating:

> "I'm of a view that Rutledge...indicates that the 1983 action, a very serious one such as this, the question that we must ask is whether the post-deprivation theory is available...under the law of the State of California..." "I had some wonder that Judge Sneed intended to go that far, but it does not seem to me that, in light of this opinion,

all personal injury 1983 actions would be by the State Court." (T, 3-4)

The question which immediately arises then is: "Can there be a post-deprivation hearing for a dead man?" Plaintiffs-appellants think not, and this is their appeal from that decision.

STATEMENT OF LEGAL ISSUE

WHETHER THE DECISION IN RUTLEDGE V. ARIZONA BOARD OF REGENTS MANDATES THAT CLAIMS INVOLVING INTENTIONAL OR RECKLESS DEPRIVATION OF LIFE, UNDER COLOR OF LAW, ARE NO LONGER ACTIONABLE IN FEDERAL COURT UNDER 42 U.S.C. §1983, BUT ARE REDRESSABLE ONLY IN STATE COURT UNDER THE APPLICABLE THEORIES OF TORT LAW.

The Lower Court held: In the affirmative.

STATEMENT OF FACTS

EVENTS LEADING TO POLICE INVOLVEMENT - A FAMILY QUARREL:

1. Plaintiffs-appellants are the estate, and the nine surviving children of RUFUS A. SMITH, SR., who was killed by Fontana police officers on May 27, 1982, at the age of 43 years. (C, 2-3)

2. On the date of his death, Mr. Smith had been visiting at an apartment, located at 9275 Cypress, in Fontana, California. (C, 7)

3. During MR. SMITH'S visit, he became involved in a family argument, and the police were called. (C, 7)

4. MR. SMITH, left the apartment before the police arrived. (C, 7)

POLICE CONFRONT DECEDENT AFTER DOMESTIC QUARREL'S CONCLUSION

5. Police officers ROBERT MEJIA and LARRY SMITH, responded to the call, and when they encountered MR. SMITH, he was in the parking lot of the apartment complex, en route to his automobile. (C, 7)

6. The officers detained MR. SMITH, in the parking lot, and instructed MR. SMITH, to place his hands on his head, and walk toward his vehicle in order to discuss the incident which they had been dispatched to investigate. (C, 7)

POLICE USE EXCESSIVE FORCE IN DETAINING DECEDENT

7. As MR. SMITH, turned toward the car, with his hands on his head, OFFICER SMITH, grabbed MR. SMITH, and placed him in a chokehold position, and began to

drag him backwards. (C, 7 and RM, 1-2)

8. While MR. SMITH was thus restrained, OFFICER MEJIA, began to knee him in the groin, and strike him in the face, again without provocation. (C, 7 and RM, 2).

9. MR. SMITH was in no position to struggle with the two officers during these events, and offered only instinctive resistance to the chokehold, and the attacks to his face and groin. (C, 7-8 and RM, 2)

CIRCUMSTANCES IMMEDIATELY PRECEDING AND FOLLOWING THE SHOOTING OF DECEDENT:

10. During the time that MR. SMITH was being held, dragged, and beaten by the officers, he was in a helpless position in which he could only instinctively and superficiously react.

11. Also during that time OFFICER SMITH drew and fired his duty revolver, striking MR. SMITH, in the back, causing the fatal injury. (RM, 2)

12. Prior to being shot, MR. SMITH, was unarmed and helpless, and in no way posed a threat to the safety of the police officers, or to that of any other persons present at the scene. (C, 8)

13. After the shooting, paramedics arrived and unsuccessfull attempted to resuscitate MR. SMITH. (C, 8)

14. MR. SMITH was later transported to Loma Linda University Medical Center, where he died during emergency surgery from his gunshot wound. (C, 8)

LAWSUIT FILED BY DECEDENT'S FAMILY AND DEFENDANTS' SUBSEQUENT MOTION TO DISMISS:

15. On July 1, 1982, decedent's children filed a lawsuit in the U.S. District Court, Central District of California, in Los Angeles, alleging numerous civil rights violations by the named defendants, under federal statutes, federal and state constitutional law, and common law principles. (C, 1-24)

16. On or about July 30, 1982, defendants-appellees, filed a Motion to Dismiss the complaint, and a hearing was set for, and conducted on August 23, 1982, in the courtroom of U.S. JUDGE WILLIAM P. GRAY. (M, 1-31)

17. Although defendants-appellees' motion was based upon several primary and alternative issues, (M, 3-5) the one

singularly relied upon the JUDGE GRAY in rendering his decision to dismiss, was the first ground articulated in defendants-appellees' motion, to wit:

> "The claims of both the estate and children should be dismissed under Rutledge v. Arizona Board of Regents, because adequate State Court remedies exist." (M, 3-4)

18. In announcing his ruling, JUDGE GRAY, indicated that the Rutledge decision was a further consequence of the U.S. Supreme Court decision in Parratt v. Taylor (451 U.S. 527, 101 S.Ct. 1908, 68 L. Ed. 2d 420 (1981)), and that the value of §1983 is largely historical. He therefore, felt compelled to dismiss the complaint. (T, 5-6)

19. Inasmuch as both Parratt and Rutledge, focused on the availability of an adequate and meaningful

post-deprivation hearing for the purposes of satisfying the due process requirement of the 14th Amendment, and neither dealt with a factual situation involving a deprivation of life, plaintiffs-appellants respectfully disagree with JUDGE GRAY'S decision and bring this appeal for clarification of that particular issue.

CONTENTIONS

I

RUTLEDGE V. ARIZONA IS NOT APPLICABLE TO THE FACTS OF THE INSTANT CASE

Plaintiffs-appellants contend that Rutledge v. Arizona Board of Regents, supra, was decided on the basis of a particular fact situation and is thus, inapplicable to the case at hand.

In Rutledge, the court held that no civil rights violations had been committed against a football player at a state school who alleged an assault and battery by the coach, as well as harassment, embarrassment, defamation, unlawful demotion, and deprivation of his football scholarship. The Court relied on Parratt v. Taylor, supra, in holding that the existence of a tort remedy under state law was the only cause of action available to that plaintiff, particularly since plaintiff's case had already been adjudicated in state court. It did not presume to construe Parratt so broadly as to include all types of deprivations potentially redressable at state law.

ESSENTIAL CONSIDERATIONS IN RUTLEDGE DECISION RELATIVE TO § 1983 ACTIONS:

The court in Rutledge rationalized its decision on the basis of three essential considerations:

1. The guidance provided by the U.S. Supreme Court in Parratt v. Taylor, relative to claims actionable under §1983;

2. The availability to plaintiff of a post-deprivation hearing, provided at a meaningful time and in a meaningful manner in order to satisfy due process requirements;

3. The type of right, privelege, or immunity secured by the Constitution and laws, underlying plaintiff's claims.

In comparing the above considerations in light of the facts in Rutledge, to the facts in the instant

case, it is clear that the end results would be substantially different as explained in the following sections.

CONSIDERATION # 1

THE GUIDANCE PROVIDED BY PARRATT

The plaintiff in Parratt v. Taylor, was a prison inmate who filed a §1983 action to recover the value of property worth $23.50. The U.S. Supreme Court, granted certiorari to hear the case because of its growing concern that the process provided by the statute was increasingly being abused. In the words of Justice Powell in his concurring opinion:

> "The present case, involving a $23.00 loss, illustrates the extent to which constitutional law has been trivalized, and federal courts often have been converted into small-claims tribunals." (Parratt, supra, at p. 1922).

In short Parratt dealt with a deprivation of a minor property interest, more appropriately assignable to the state court, as opposed to the violation of a constitutional right. The Court, consequently, held that the state prisoner, whose property had been negligently lost by prison officials had suffered no violation of his rights under the 14th Amendment, because the state had a tort claims procedure through which the plaintiff might sought redress, and been fully compensated.

The ultimate meaning and significance of the Parratt decision is not clear. However, most courts which have considered the issue have confined Parratt to its facts--a negligent deprivation of property);

Wakinekona v. Olim, 664 F. 2d 708, (9th Cir. 1981), (Parratt does not apply to intentional deprivations of property);

Parker v. Rockefeller 521 F. Supp. 1013 (N.D. W. Va. 1981) (Parratt does not apply to intentional deprivations of property);

Tarkowski v. Hoogasian, 532 F. Supp. 791, (N.D. Ill. 1982) (Parratt does not apply to intentional deprivations of property).

The dictum in Justice Rehnquist's opinion in Parratt, and the various opinoins filed by the other Justices, also suggest uncertainly about whether intentional deprivation of property or

deprivation of life or liberty could be said to be adequately redressed by state tort remedies. Interpreted that broadly, the case would appear to be in substantial conflict with Monroe v Pape, 365 U.S. 167 (1961), which established that exhaustion of state or administrative remedies is not required prior to filing a §1983 damage action. The Parratt Court did not overrule this decision, but did indicate that its recent decisions in, e.g. Paul v. Davis, 424 U.S. 693 (1976), and Ingraham v. Wright, 430 U.S. 651 (1977), have demonstrated that the availability of state tort remedies may be considered relevant to the question whether federal constitutional rights have been violated. The Court also indicated that its decision, based on the facts of the

case, was "fully consistent with" its prior cases and that to allow a $23.50, claim to rise to the dignity of a constitutional tort merely because it involves a state official, would open the doors of the federal courts to even more insignificant litigation, and:

> "'would make the 14th Amendment a font of a tort law to be superimposed upon whatever system may already be administered by the states.' (Paul v. Davis). We do not think that the drafters of the 14th Amendment intended the amendment to play such a role in our society."

Even more persuasive on the issue of how Parratt should be construed is the language contained in the concurring opinion filed by Justice Blackmun in that case:

> "While I join the Court's opinion in this case, I write separately to emphasize my understanding of its narrow reach. (emphasis added) This

> suit concerns the deprivation only of property... I do not read the Court's opinion as applicable to a case concerning deprivation of life or liberty..." (Parratt, supra, at p. 1918)

Although the Rutledge, opinion "assumed without deciding" that the plaintiff's assault and battery allegation was a deprivation of "liberty" for the sake of argument, it did not focus its attention on that aspect, but on "whether (the deprivation) was done 'without due process of law'" and stated the issue before it in those terms:

> "That being so, the issue is whether the post-deprivation hearing available to the appellant...satisfies the due process requirement of the 14th Amendment." (Rutledge, supra, at p. 1352).

It is doubtful, though, that a couple of blows on a football

player's helmet inflicted by his coach, could be constued seriously as a deprivation of liberty under the 14th Amendment.

The facts, then, in Rutledge dictated the outcome in that case, rather than the legal principle espoused in Parratt, for as Justice Blackmun so aptly stated in his concurring opinion:

> "The mere availability of a subsequent tort remedy before tribunals of the same authority that...deliberately inflicted the harm complained of, might well not provide the due process of which the 14th Amendment speaks." (Parratt, supra, at p. 1918).

So, if the Rutledge opinion was guided by the "teaching of Parratt v. Taylor" as Judge Sneed explicitly stated in Rutledge then it would appear that the allegations presented in the instant

case would have necessitated a different result.

In the present case, we are not dealing with a mere assault and battery, or any of the various other charges brought by a disgruntled college football player who had already litigated unsucessfully in state court on non-constitutional grounds. Here, we are faced with the very type of situation which §1983, was <u>designed</u> to address -- that of a cruel, malicious, reckless, and racially motivated taking of the life of a Black, U.S. citizen, by a local official whose abuse of his authority, enabled him to accomplish the act, and with the apparent acquiescence of his superior officials. This case, involving the senseless killing of RUFUS A. SMITH, SR., <u>cannot</u>, by the standards

of basic human justice, as well as of statutory and constitutional law, be classified as a mere tort. It does not fall within the realm of frivolous or insignificant litigation currently crowding federal court dockets. And it should not be denied its statutory right, under §1983, to a federal forum because of the broad application of a totally distinguishable case!

CONSIDERATION # 2

AVAILABILITY OF A MEANINGFUL POST-DEPRIVATION HEARING

Parratt v. Taylor, supra, teaches us, as acknowledged by the Rutledge opinion, that when there can be no practical provision for a pre-deprivation hearing, a "post-deprivation hearing provided 'at a meaningful time and in a meaningful

manner' will suffice. The issue becomes merely whether the remedies available under (state) law and in the (state) courts constitute the post-deprivation hearing required by the 14th Amendment." (Rutledge, supra, at p. 1352).

Thus, the availability of state remedies is not always enough to satisfy due process. The adequacy of those remedies must also be addressed in deciding whether due process has been satisfied in a particular case.

The Parratt Court explained this procedure by discussing its past cases which, it concluded, "mandate that some kind of hearing is required at some time before a State finally deprives a person of his property interests." (Parratt, supra, at p. 1916, emphasis added).

Justice Rehnquist went on to state that the "prior cases which have excused the prior hearing requirement have rested import on the availability of some meaningful opportunity subsequent to the initial taking for a determination of rights and liabilities." (Parratt, supra, at P. 1916, emphasis added).

The words "initial" and "finally" are the key words in Justice Rehnquist's analysis because they suggest the existence of a continuum with in the framework of deciding whether a state has deprived an individual of a protected interest without due process of law. In other words, due process can be satisfied if a person has the opportunity to be heard eventually

before the state's deprivation of his or her interest becomes finalized.

In applying the above anylysis to the facts in Rutledge, the reasoning of the court therein becomes clear. It was reasonable for the Court to conclude that the state remedies available to that plaintiff were adequate to satisfy due process:

> "In the instant case, since appellant has sought redress in the Arizona state court, and in the absence of suggestion that the post-deprivation procedures under state law are deficient, we must conclude that the alleged deprivation was not without due process of law." (Rutledge, supra, at p. 1352).

The court reasonably found that MR. RUTLEDGE did have an opportunity to have his alleged wrongs vindicated via state procedures and had, in fact, availed himself of those opportunities in previous litigation at the state level.

His post-deprivation remedy, therefore, was preserved until the "taking" became final on the continuum. Those facts are not equally applicable to the instant case, however.

In this case, there is no post-deprivation hearing available to MR. SMITH, to determine whether his life should or should not have been destroyed. The initial taking and the final taking occurred simultaneously when one police bullet relegated MR. SMITH, to a mere memory. Once taken, his life could not effectively be placed on the theoretical continuum to determine the finality of its deprivation, since there can be no greater finality than death. Due process requirements, therefore, could not have been satisfied in MR. SMITH'S

case. It should be unquestioned, then that his constitutional rights were violated. No subsequent tort remedy available to MR. SMITH'S estate or to his nine children will alter that. His case involves a federal question and deserves to be heard in a federal arena.

CONSIDERATION # 3:

THE TYPE OF PROTECTED RIGHT, PRIVILEGE, OR IMMUNITY UNDERLYING THE COMPLAINT

As stated earlier, the category of the protected interest forming the basis of a claim under §1983, played a crucial role in the Parratt and Rutledge, Court's determination of whether the claims of the plaintiffs in those cases were actionable under the statute.

The Rutledge opinion was significantly predicated on Parratt,

which dealt with a negligent deprivation of property. As previously mentioned, most courts have confined their application of Parratt, to situations other than negligent deprivations of property (since it vaguely addressed a "liberty" deprivation in Rutledge), there is apparently some conflict within the 9th Circuit on this issue. Wakinekona v. Olim, supra, is a case in point. It too, is a 9th Circuit case which dealt with a deprivation of liberty issue, but, there, Parratt was held not to apply. Interestingly enough, both cases were decided in 1981.

Neither Parratt, Rutledge, nor Wakinekona, however, dealt with a deprivation of life, and much of the language in Parratt suggests that such a deprivation would still be actionable

under §1983, assuming the requisite allegations.

Inasmuch as the instant case involves the deprivation of a human life under color of law, it should still be actionable under §1983. This result would not be inconsistent with the controlling cases.

II

THE VALUE OF § 1983 IS NOT MERELY HISTORICAL

U.S. JUDGE WILLIAM P. GRAY, in deciding to dismiss the instant case from federal court, stated during oral argument:

> "Of course, there is a lot of sense that the value of §1983, is largely historical, as both you and I know. . .the State Courts are just as able to take care of a situation in which a police officer uses a gun and shoots a man in the back as they are to take care of a

situation where a football coach slaps a player." (T, 5)

This statement not only minimizes the importance of §1983, but also ignores the question of whether due process was satisfied in this particular case.

Although §1983, was enacted in 1971, its relevance and value are not, thereby confined to that period in our country's history. It is still a vital part of our modern judicial system. Many of the very conditions which existed during the time of the statute's enactment are still prevalent today.

The Civil Rights Act of 1871, (§1983) was one of the statutes intended to implement the 14th Amendment. At the time of its enactment, it was sometimes called "the third 'force bill'" and was passed by a Congress that had the Ku

Klux Klan, particularly in mind, during a period of lawlessness in the South.

According to the opinion in Monroe v. Pape, supra, one reason the legislation was passed was:

> "...to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the 14th Amendment might be denied by the state agencies...'' (Monroe v. Pape, supra).

The facts in Monroe v. Pape, also involved alleged police misconduct as in the instant case. The case came from Illinois, where it was pointed out, as here, that "under Illinois law a simple remedy is offered for that violation and ... the courts of Illinois are available to give petitioners that full redress which the common law affords for

violence done to a person..." (Monroe v. Pape, supra).

The Monroe Court considered the above argument, but still concluded:

> "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplemental to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." (Monroe v. Pape, supra).

Since Monroe has not been overruled, its decision is still valed. Further, it recognition that the conditions existing in the South in 1871, were not unlike appraisal of California's societal conditions in the year 1983. Racism is still rampant, Balcks still suffer from the effects of economic and social in justice, and the Ku Klux Klan is still alive and well, particularly in the City of Fontana, where RUFUS A.

SMITH, SR., was shot, in the back by police.

As the need, which inspired §1983's enactment continues, so must its application to cases like the present one, involving a racially-motivated police killing. Teh case of MR. SMITH belon in federal court just as much today as it would have in 1871, and JUDGE GRAY'S decision to dismiss it therefrom, should be reversed.

CONCLUSION

As expressed in the preceding paragraphs, the single issue herein is whether the decision in Rutledge v. Arizona Board of Regents, supra, is applicable to the facts in the instant case, requiring its dismissal from federal court.

Plaintiffs-appellants, contend that it is not, for the following reasons:

1. Rutledge, supra, is controlled by the decision in Parratt v. Taylor, supra, which should be confined to its facts; i.e., negligent deprivation of property;

2. Due process requires, as announced in both Parratt and Rutledge, that where a pre-deprivation hearing is impossible or impractical, a post-deprivation hearing must be provided at a meaningful time and in a meaningful manner, before the deprivation can be said to have been

finalized. Under the facts of this case, neither a pre-deprivation nor a post-deprivation hearing were available because the initial taking, and the final taking occurred simultaneously. Thus, due process could not have been satisfied;

3. The claim in this case involves a serious allegation of an unconstitutional deprivation of a human life, as opposed to the insignificant types of so-called §1983 claims which have been flooding the federal courts in the past few years, and which the Parratt Court sought to deter.

4. 42 U.S.C. §1983, is still as vital today for redressing serious violations of individual civil rights by the state, as it was during the period of its enactment. It must not now be so diluted that legitimate federal claims such as those in the instant case, are barred from the federal courts.

To protect the vitality of §1983, and the rights which it was designed, and intended to safeguard, the lower court's order dismissing the complaint

herein from U.S. District Court should, and must, be reversed.

Dated: January 14, 1983.

Respectfully submitted,

BY: _____

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_____

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APPENDIX 1

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SONJA RENEE SMITH, etc., et al.,	)
Plaintiffs,	)
vs.	)
THE CITY OF FONTANA, etc., et al.,	)
Defendants.	)

No. CV 82 3282 WPG

ORDER RE DISMISSAL

Upon consideration of the moving papers in support of the defendants' Motion to Dismiss and the Opposition

papers, and the oral argument of counsel for the plaintiff and defendants at the regularly scheduled August 23, 1982 hearing in Department 8 of the above-entitled Court, the Honorable William P. Gray, Presiding,

IT IS HEREBY ORDERED AND DECREED THAT:

The plaintiffs' complaint be dismissed in its entirety, with prejudice.

Dated: _____

_____
JUDGE, UNITED STATES
DISTRICT COURT

Supreme Court, U.S.
FILED
OCT 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-216

In The

Supreme Court of the United States

October Term, 1987

THE CITY OF FONTANA, a Municipal Corporation; ROBERT MEJIA; LARRY SMITH; NATHAN A. SIMON; CHARLES A. KOEHLER; BEN ABERNATHY; BILL FREEMAN; DONALD F. DAY; WILLIAM KRAGNESS; JACK RATELLE; JOHN M. RAGER; and KATHY WILSON,

Petitioners,

vs.

SONJA RENEE SMITH, as Administratrix of the Estate of RUFUS A. SMITH, SR., Deceased, as Guardian Ad Litem for the Minor Children of the Deceased, and Individually; RUFUS ANTHONY SMITH, JR., Individually; MARCUS SMITH, a Minor; NETRA SMITH, a Minor; ANTHONY SMITH, a Minor; JARREN SMITH, a Minor; SHERRI SMITH, a Minor; ARKILLIUS SMITH, a Minor; and TASHIEKA SMITH, a Minor,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The decision rendered by the United States District Court of Appeals for the Ninth Circuit which forms the basis for this Petition for Writ of Certiorari, may not be as broadly construed as suggested by the questions presented by petitioners. Respondents: SONJA RENEE SMITH, as Administratrix of the Estate of RUFUS A. SMITH, SR., Deceased, as Guardian Ad Litem for the Minor Children of the Deceased, and Individually; RUFUS ANTHONY SMITH, JR., Individually; MARCUS SMITH, a Minor; NETRA SMITH, a Minor; ANTHONY SMITH, a Minor; JARREN SMITH, a Minor; SHERRI SMITH, a Minor; ARKILLIUS SMITH, a Minor; and TASHIEKA SMITH, a Minor, therefore, respectfully submit that the following questions more accurately state the questions before the Supreme Court:

A. Whether the children's interest in the continued companionship and society of their father is a cognizable liberty interest under the due process clause?

B. Whether minor and adult children have a constitutionally protected liberty interest in the companionship and society of a parent?

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United States Constitution, Amendment XIV, Section 1 ..... 2, 3

No. 87-216

In The

Supreme Court of the United States

October Term, 1987

THE CITY OF FONTANA, a Municipal Corporation; ROBERT MEJIA; LARRY SMITH; NATHAN A. SIMON; CHARLES A. KOEHLER; BEN ABERNATHY; BILL FREEMAN; DONALD F. DAY; WILLIAM KRAGNESS; JACK RATELLE; JOHN M. RAGER; and KATHY WILSON,

Petitioners,

vs.

SONJA RENEE SMITH, as Administratrix of the Estate of RUFUS A. SMITH, SR., Deceased, as Guardian Ad Litem for the Minor Children of the Deceased, and Individually; RUFUS ANTHONY SMITH, JR., Individually; MARCUS SMITH, a Minor; NETRA SMITH, a Minor; ANTHONY SMITH, a Minor; JARREN SMITH, a Minor; SHERRI SMITH, a Minor; ARKILLIUS SMITH, a Minor; and TASHIEKA SMITH, a Minor,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents: SONJA RENEE SMITH, as Administratrix of the Estate of RUFUS A. SMITH, SR., Deceased, as Gardian Ad Litem for the Minor Children of the Deceased, and Individually; RUFUS ANTHONY SMITH, JR., Individually; and MARCUS, NETRA, ANTHONY, JARREN, SHERRI, ARKILLIUS, and TA-

SHIEKA SMITH, Minors, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Order and Amended Opinion of the United States District Court of Appeals for the Ninth Circuit entered in this proceeding on May 5, 1987.

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PROVISIONS OF LAW INVOLVED

This case primarily involves the proper application of the provisions of *42 U.S.C. Section 1983*, which states, in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Pertinent provisions of the Constitution and other laws involved in this case are:

1. Amendment IV of the United States Constitution as it applies to the States:

> "The right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated . . ."

2. Article XIV, Section 1, of the United States Constitution:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law . . ."

3. *42 U.S.C. Section 1981:*

> "All persons within the jurisdiction of the United States shall have the same right in every state . . . to the full and equal benefit of all laws and proceedings for the security of persons . . . as is enjoyed by white citizens . . ."

4. *42 U.S.C. Section 1988:*

> "The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . ., the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . ."

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STATEMENT OF THE CASE

On July 1, 1982, Respondents filed a Complaint in the United States District Court for the Central District of California against petitioners, pursuant to *42 U.S.C. Sections 1981, 1983, 1985(2)(3), 1986,* and *1988,* as well as under the First, Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, in con-

nection with a police shooting which resulted in the death of RUFUS A. SMITH, SR.

On petitioner's motion, respondents' Complaint was dismissed in its entirety for failure to state a claim, on the ground that relief under *Section 1983* was barred by *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981). Following respondents' appeal of the dismissal to the Ninth Circuit Court of Appeals, the Appellate Court reversed the decision of the lower court, holding that *Parratt* and its progeny are inapplicable to civil rights actions asserting substantive as opposed to purely procedural due process violations, and that respondents clearly had alleged substantive due process violations in their Complaint.

In making its decision to reverse the lower court ruling, the Appellate Court relied upon recent decisions of the U.S. Supreme Court in *Daniels v. Williams*, 106 S.Ct. 662 (1986); *Haygood v. Younger*, 769 F.2d 1350 (9th Cir. 1985) (en banc); *Piatt v. MacDougall*, 773 F.2d 1032 (9th Cir. 1985) (en banc); and *Bretz v. Kelman*, 773 F.2d 1026 (9th Cir. 1985) (en banc). The Appellate Court's Opinion was filed on January 6, 1987.

Petitioners later filed a Petition for Rehearing en banc. The Petition for Rehearing was denied, and the suggestion for a rehearing en banc was rejected. The Appellate Court's Amended Opinion was filed on May 5, 1987, and a Second Amended Opinion, which merely deleted a footnote, was filed on July 7, 1987.

In its Amended Opinion, the Court ruled, inter alia, that the adult and minor children of the deceased could assert personal substantive due process claims related to

the death of their father in that they had a cognizable liberty interest in, and had been deprived of, their father's society and companionship without due process of law. Petitioners are now petitioning this Court for a Writ of Certiorari to review the decision of the Ninth Circuit Court of Appeals as it relates to the children's substantive due process claims.

REASONS FOR DENYING THE WRIT

Petitioners assert in their petition that they are "seeking to delimit the extension of **vicarious** Constitutional protection provided to family members, other than parents, of a family member who died as a result of governmental action." (Petition, at p.6, emphasis added). The Appellate Court's ruling, however, clearly articulates that adult and minor children have a **personal**, constitutionally protected right to the continued society and companionship of a parent, without unwarranted state interference. In short, not only does the father have the right not to be deprived of his **life** without due process, the children have an equally protected **liberty** interest in the continuation of the parental relationship.

A.

THE APPELLATE COURT WAS CORRECT IN HOLDING THAT THE CONSTITUTIONAL INTEREST IN FAMILIAL COMPANIONSHIP AND SOCIETY LOGICALLY EXTENDS TO PROTECT CHILDREN FROM UNWARRANTED STATE INTERFERENCE WITH THEIR RELATIONSHIPS WITH THEIR PARENTS.

The Amended Opinion of the Appellate Court, on pages B-32 through B-36 of Petitioners' Appendix, adopted herein, clearly states the Court's rationale for holding that children have a constitutionally protected liberty interest in a continued child-parent relationship, free from unwarranted state interference, even though previous Supreme Court decisions have addressed only the issue of the protections accorded to the parent-child relationship. The Court concluded that:

> "The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal, and we see no reason to accord less constitutional value to the child-parent relationship than we accord to the parent-child relationship" (Petitioners' Appendix, pages B-35/36).

The Appellate Court leaves no doubt that the type of familial relationships to be reached by its decision concerns only parents and children. No decision is made with respect to the relationships between siblings, or aunts, uncles, cousins, etc. Petitioners' espoused fear of "the potential flood of spurious 'coattail' litigation brought by family members vicariously asserting violations of their constitutional rights as a result of governmental action taken against another family member", then, appears to be groundless.

B.

THE APPELLATE COURT WAS CORRECT IN ITS FINDING THAT MINOR AND ADULT CHILDREN HAVE A COGNIZABLE LIBERTY INTEREST IN THEIR RELATIONSHIP WITH THEIR FATHER, AND IN ITS HOLDING THAT THE SAME USE OF EXCESSIVE POLICE FORCE WHICH GIVES RISE TO THE FATHER'S SUBSTANTIVE DUE PROCESS CLAIM BASED ON HIS LOSS OF LIFE, ALSO GIVES THE CHILDREN A SUBSTANTIVE DUE PROCESS CLAIM BASED ON THEIR LOSS OF HIS COMPANIONSHIP.

The question before this Court is not merely whether the death of one family member as a result of governmental action deprives another family member of a cognizable constitutional interest, but rather, whether a parent's deprivation of life by unwarranted state action simultaneously results in the deprivation of the liberty interest of the parent's adult and minor children in the society and companionship of the parent.

The Appellate Court held that such tandem rights do exist between parents and children and that those rights are constitutionally protected.

In rendering its decision, the Appellate Court found ample and compelling support in past U.S. Supreme Court cases, as well as in the legislative history of *42 U.S.C. Section 1983*'s precursor, the *Ku Klux Klan Act of 1871.*

In addition to the case law and legislative history cited by the Ninth Circuit Appellate Court, at least one State Supreme Court, the Supreme Court of Colorado, has held that children of a deceased may assert the violation of a constitutional liberty interest in the continued life of the

deceased as part of an action against those who, under color of state law, deprive others of rights protected under the Federal Constitution or federal law [See *Espinoza v. O'Dell* (1981) 633 P.2d 455].

Although petitioners allege in their brief that the Appellate Courts have broadened the protection of parent-child relationships "to include constitutional deprivations suffered by other family members, based on a number of different rationales, to protect a variety of substantive interests," they fail to cite any particular cases to demonstrate the existence of any conflict on that issue. The Ninth Circuit Court of Appeals addressed only the nature of the interests protected by the Constitution with respect to parents and children, and the circumstances under which their unwarranted deprivation can rise to the level of a substantive due process violation.

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CONCLUSION

The Ninth Circuit Court of Appeals was required to render a well-reasoned decision on the various issues before it at the time of respondents' appeal. It did so.

The issues decided by the Court which relate to this petition dealt with a limited class of cases predicated on the sanctity of the parent-child and child-parent relationship. In reversing the lower court's decision to dismiss the due process claims of the decedent's adult and minor children, the Appellate Court made the logical extension of previous U.S. Supreme Court cases, which accorded protection to parents in maintaining the companionship and

upbringing of their children, to provide similar protection to children in preserving the society and companionship of their parents.

No similar connection can be drawn between other types of family relationships as a result of this Appellate Court's decision, no confusion among the lower district courts is imminent, and no federal question has been decided by the Appellate Court in such a way as to conflict with applicable decisions of the U.S. Supreme Court. As such, respondents respectfully request that the Petition for Writ of Certiorari be denied.

DATED: October 9, 1987.

Respectfully submitted,

ANDRENA G. DANCER and
CHARLES B. JOHNSON,
Attorneys for Respondents

APPENDIX

Respondents: SONJA RENEE SMITH, as Administratrix of the Estate of RUFUS A. SMITH, SR., Deceased, as Guardian Ad Litem for the Minor Children of the Deceased, and Individually; RUFUS ANTHONY SMITH, JR., Individually; MARCUS SMITH, a Minor; NETRA SMITH, a Minor; ANTHONY SMITH, a Minor; JARREN SMITH, a Minor; SHERRI SMITH, a Minor; ARKILLIUS SMITH, a Minor; and TASHIEKA SMITH, a Minor, hereby adopt and, incorporate herein by reference, the Appendix for Petition for Writ of Certiorari filed by petitioners on August 3, 1987.